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No. 00-836-CSX Title: George W. Bush, Petitioner
v.
Palm Beach County Canvassing Board et al.

Docketed: November 22, 2000 Court: Supreme Court of Florida

Entry	Date	Proceedings and Orders
	Nov 22 2000	Petition for writ of certiorari filed. (Response due December 22, 2000)
	Nov 22 2000	Motion of petitioner to expedite consideration of the petition for a writ of certiorari filed.
	Nov 22 2000	Motion of petitioner for leave to file a petition for a writ of certiorari on 8 1/2 by 11 inch page proofs filed.
	Nov 23 2000	Brief of respondents Al Gore, Jr., and Florida Democratic Party in opposition filed.
	Nov 23 2000	Motion of respondents Al Gore, Jr., and Florida Democratic Party for leave to file the brief in opposition on 8 1/2 by 11 inch page proofs filed.
	Nov 24 2000	Reply brief of petitioner George W. Bush filed.
	Nov 24 2000	Brief of respondents Katherine Harris, et al., in support of petition filed.
	Nov 24 2000	Brief of respondent Theresa LePore, et al., in opposition filed.
	Nov 24 2000	Motion of petitioner to expedite consideration of the petition for a writ of certiorari GRANTED.
	Nov 24 2000	Motion of petitioner for leave to file a petition for a writ of certiorari on 8 1/2 by 11 inch page proofs GRANTED.
	Nov 24 2000	Motion of respondents Al Gore, Jr., and Florida Democratic Party for leave to file the brief in opposition on 8 1/2 by 11 inch page proofs GRANTED.
	Nov 24 2000	Petition GRANTED. on Questions 1 and 2 presented by the petition. In addition, the parties are directed to brief and argue the following question: What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. Sec. 5? The briefs of the parties, not to exceed 50 pages, are to be filed with the Clerk and served upon opposing counsel on or before 4 p.m., Tuesday, November 28, 2000. Reply briefs, if any, not to exceed 20 pages, are to be filed with the Clerk and served upon opposing counsel on or before 4 p.m., Thursday, November 30, 3000. The parties are encouraged to agree on the contents of a joint appendix. Rule 29.2 is suspended in this case. Briefs may be filed in compliance with Rule 33.2 to be replaced as soon as possible with briefs prepared in compliance with Rule 33.1. The case is set for oral argument on Friday, December 1, 2000, at 10 a.m. and a total of one and one-half hours is allotted for oral argument. SET FOR ARGUMENT December 1, 2000.

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No. 00-836-CSX

Entry	Date	Proceedings and Orders
	Nov 24 2000	Motion of James J. Clancy for leave to file a brief as amicus curiae filed.
	Nov 26 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the respondent Palm Beach County Canvassing Board, et al.,
	Nov 27 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for respondents Al Gore, Jr., and the Florida Democratic Party.
	Nov 27 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
	Nov 27 2000	Brief amici curiae of Florida Senate and House of Representatives filed.
	Nov 27 2000	Motion of respondents Katherine Harris, et al., for divided argument filed.
	Nov 27 2000	Motion of respondent Robert A. Butterworth, Attorney General of Florida, for divided argument filed.
	Nov 27 2000	Brief of respondents Broward County Canvassing Board, et al., in opposition filed.
	Nov 27 2000	Waiver of right of respondent Matt Butler to respond filed.
	Nov 28 2000	Joint appendix filed.
	Nov 28 2000	Brief of petitioner George W. Bush filed.
	Nov 28 2000	Brief of respondent Robert A. Butterworth, Attorney General of Florida, filed.
	Nov 28 2000	Brief amici curiae of Virginia, South Carolina, and Nebraska filed.
	Nov 28 2000	Brief of respondents Al Gore, Jr.,and Florida Democratic Party filed.
	Nov 28 2000	Brief of respondents Katherine Harris, et al., filed.
	Nov 28 2000	Brief of respondent Palm Beach Canvassing Board filed.
	Nov 28 2000	Brief amicus curiae of Coalition for Local Sovereignty filed.
	Nov 28 2000	Brief amici curiae of Disenfranchised Voters in the USA, et al., filed.
	Nov 28 2000	Brief amici curiae of William Haynes, et al., filed.
	Nov 28 2000	Brief amici curiae of Alabama, et al., filed.
	Nov 28 2000	Brief amicus curiae of American Civil Liberties Union filed.
	Nov 28 2000	Brief amicus curiae of American Civil Rights Union filed.
	Nov 28 2000	Brief amici curiae of Iowa, et al., filed.
	Nov 28 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the respondents Katherine Harris and Florida Elections Canvassing Commission.
	Nov 29 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for Broward County Canvassing Board and Jane Carroll.
	Nov 29 2000	Motion of James J. Clancy for leave to file a brief as amicus curiae DENIED.
	Nov 29 2000	Motion of respondents Katherine Harris, et al., for divided argument GRANTED.

No. 00-836-CSX

Entry	Date	Proceedings and Orders
	Nov 29 2000	Motion of respondent Robert A. Butterworth, Attorney General of Florida, for divided argument GRANTED.
	Nov 29 2000	Reply brief of respondents Al Gore, Jr., and Florida Democratic Party filed.
	Nov 30 2000	Reply brief of petitioner George W. Bush filed.
	Nov 30 2000	Reply brief of respondent Robert A. Butterworth, Attorney General filed.
	Nov 30 2000	Supplemental brief of respondent Al Gore, Jr., and Florida Democratic Party filed.
	Nov 30 2000	Reply brief of respondents Katherine Harris, et al., filed.
	Nov 30 2000	Motion of James J. Clancy for leave to file a brief as amicus curiae, out-of-time, and for other relief filed.
	Dec 1 2000	ARGUED.
	Dec 4 2000	Adjudged to be VACATED and REMANDED for further proceedings not inconsistent with this opinion. Opinion per curiam.
	Dec 4 2000	Clerk directed to issue mandate forthwith.
	Dec 4 2000	MANDATE ISSUED.

Supreme Court, U.S.
FILED
NOV 2 3 2001
CLERK

(1)

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of Florida has held that the Secretary of State cannot certify election results in accordance with preexisting Florida law and must instead wait for the statutorily untimely results of manual recounts conducted in three Florida counties before certifying the results of the November 7, 2000 presidential election. This holding raises three substantial federal questions that warrant immediate review by this Court:

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

3. Whether the use of arbitrary, standardless, and selective manual recounts that threaten to overturn the results of the election for President of the United States violates the Equal Protection or Due Process Clauses, or the First Amendment.

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PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Governor George W. Bush, as candidate for President; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, as members of the Elections Canvassing Commission; Matt Butler; Palm Beach County Canvassing Board; Broward County Canvassing Board; Broward County Supervisor of Elections; Robert A. Butterworth, as Attorney General, State of Florida; Florida Democratic Party; and Vice President Albert Gore, Jr., as candidate for President.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner George W. Bush, the candidate of the Republican Party for the office of President of the United States, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Florida in this case. In plain contravention of the requirements of the Constitution of the United States and federal law, the state supreme court has embarked on an *ad hoc*, standardless, and lawless exercise of judicial power, which appears designed to thwart the will of the electorate as well as the considered judgments of Florida's executive and legislative branches. Because the selection of presidential electors is governed directly by the Constitution and congressional enactments, as well as by state law, the court's decision involves issues of the utmost *federal* importance.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App., *infra*, 1a-39a) is not yet reported. The orders of the Circuit Court of the Second Judicial District for the County of Leon, Florida (App., *infra*, 43a-44a & 45a-51a) are not reported.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 21, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

The decision below compels the Florida Secretary of State and Elections Canvassing Commission to accept, and include in the State's certification of election returns, untimely election results derived from selective manual recounts being conducted in certain Florida counties. App., *infra*, 42a. The judgment below is therefore "final" for purposes of this Court's jurisdiction under § 1257; indeed, it amounts to the entry of a per-

manent injunction against the responsible state officials. *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945) (entry of injunction is "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein").

As demonstrated *infra*, petitioner expressly raised below the federal questions presented in this petition. Accordingly, the Florida Supreme Court's failure to address petitioner's federal claims, and its assertion that "[n]either party has raised as an issue on appeal the constitutionality of Florida's election laws" (App., *infra*, 11a, n.10), is no barrier to review by this Court. "The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969). *See also Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956) (this Court has a "duty to . . . determine for ourselves precisely the ground on which the judgment rests"). Accordingly, a state court cannot evade this Court's review by failing to discuss federal questions in its opinion. *Chapman v. Goodnow's Adm'r.*, 123 U.S. 540, 548 (1887) ("If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right . . . as if it has been specifically referred to and the right directly refused.").

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 3, Section 5 of the United States Code provides: "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5.

Article II, Section 1, Clause 2 of the Constitution provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Pursuant to this Court's Rule 14.1(f), the provisions of Florida election law involved in this case, including Fla. Stat. §§ 102.111, 102.112, 102.141(4), 102.166, 102.168, and 106.23, are set forth at App., *infra*, 52a-61a.

STATEMENT OF THE CASE

On Tuesday, November 7, 2000, the citizens of the several States, including Florida, cast their votes for the electors for the President and Vice President of the United States. An initial count of the ballots cast in Florida showed that Governor George W. Bush and Dick Cheney received the most votes in the election, subject to the counting of absentee ballots. Because the margin of victory was less than .5 percent, however, an automatic statewide recount commenced. *See* Fla. Stat. § 102.141(4). The automatic statewide recount confirmed that Gov. Bush and Secretary Cheney received the most votes. The absentee ballots have now been counted, and Gov. Bush and Secretary Cheney again have received the most votes. Nonetheless, the outcome of the Florida election has not been certified, and the American people are still uncertain as to who their next President will be. Petitioners have no choice but to seek this Court's intervention.

I. The Underlying Litigation

Once election results had been tabulated in most of the other states in the union, it became apparent that the victor in the State of Florida would almost certainly be the next President of the United States. Dissatisfied with the results of the initial count and the automatic recount, officials of the Democratic Party filed requests for manual recounts in four selected Florida counties: Broward, Miami-Dade, Palm Beach, and Volusia Counties. In each of these counties, Vice President Gore had received a substantial majority of the votes cast in the election.

As this Court is undoubtedly aware, the chaos that erupted in the wake of these selectively focused requests for manual recounts has been striking. Unrestrained by statutory guidance, the counties have embarked upon various paths in attempting to divine the "intent of the voters." Counties have adopted conflicting guidelines

for achieving this goal, and have repeatedly changed guidelines and standards in the midst of the recounting process. The widely varying and inconsistent policies (or lack of policies) underscores the absurdity of the purported objective of a manual recount conducted under these conditions. A manual recount in selected limited counties without consistent standards according to guidelines that are constantly changing and where subjective judgments are being exercised by persons who know that their decisions may alter the results of the presidential election will not yield a more accurate tabulation than the original statewide machine count, it will simply undermine the credibility and integrity of any final result.

The manual recount process has also undermined the physical integrity of the voters' ballots. Ballots have been damaged throughout the manual recount process by being twisted, rumpled, creased, and dropped; some have been stained with ink, poked with pens, and crushed. This aggressive, careless treatment of the ballots has apparently changed their original character in that chads, still attached after voters cast the ballots, have been dislodged in bunches, littering the floor of the recount rooms. It has become impossible to determine the actual condition of the ballots as they appeared when they were cast in the November 7 election in the specified counties.

The chaos and confusion over the manual recount process has triggered numerous legal actions. Two of those legal actions reached the Florida Supreme Court and are the subject of this petition.

A. The Recount Authority Litigation

One lawsuit at issue involves the authority of the selected counties to conduct a manual recount of the votes cast on November 7. This proceeding centers on a request by the Palm Beach County Canvassing Board, which asked whether an "error in the vote tabulation"

under Florida election law (Fla. Stat. § 102.166(5)), which was the statutory condition precedent for the exercise of the authority to initiate manual recount proceedings, referred to errors in the tabulation system itself or, more broadly, included discrepancies between the number of votes determined by the tabulation system and a sample manual recount. Exhibits A and B, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346.

In response to the Palm Beach request, the state Division of Elections, the State office charged by the legislature with responsibility for interpreting Florida election law, Fla. Stat. § 106.23, issued an opinion that manual recounts are not authorized unless the County Canvassing Board concludes that "the vote tabulation system fails to count . . . properly punched punchcard ballots." Exhibit C, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346. The opinion continued that "unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county. . . ." *Id.* The following day Florida's Attorney General issued an advisory opinion on the same issue that contradicted the Division of Election's advisory opinion. Exhibit D, attached to Palm Beach County Canvassing Board's Emergency Petition For Extraordinary Writ in case number SC00-2346.

In response to these conflicting opinions from the Florida executive branch, the Palm Beach County Canvassing Board filed a pleading with the Florida Supreme Court in which it asked the court to resolve the conflict.

B. The Recount Certification Litigation

The second legal proceeding relevant to this petition arose out of the Florida statutory deadline for certifying election results, which by law is set for 5:00 p.m. on the seventh day after the election, *i.e.*, Tuesday, November 14. Fla. Stat. § 102.111(1).[1] After a Florida Circuit Court enjoined the Secretary of State from declaring that all manual recounts had to be completed by the statutory deadline and directed her to exercise her discretion to determine whether to include untimely election returns in her certification of the election results, the Secretary asked counties interested in submitting explanations for extending the deadline to do so by 2:00 p.m. on Wednesday, November 15. FDEC App. 5, Ex. E.[2] After receiving submissions from four counties (FDEC App. 5, Ex. O), the Secretary of State exercised her discretion and concluded that insufficient reasons had been given to justify extending the deadline to include the results of manual recounts not yet complete. FDEC App. 5, Ex. H.

Vice President Gore and others sued for an order directing the Secretary to waive the statutory deadline and allow late results from three counties—Broward, Miami-Dade, and Palm Beach—to be included in the final vote tally. FDEC App. 12. On November 17, after a hearing the previous afternoon, the Circuit Court for Leon County issued its decision denying the motion. FDEC App. 13. The court held that the Secretary of State had not violated its November 14 Order and explained that

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[1] Volusia County submitted its manual recount results before the 5:00 p.m., November 14 deadline and, therefore, is in a different category than the other three counties.

[2] "FDEC App." refers to the Appendix to the Initial Brief filed on behalf of Albert Gore, Jr., and the Florida Democratic Executive Committee in the court below.

"the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." App., *infra*, 44a.

II. Proceedings In The Florida Supreme Court

The Supreme Court of Florida consolidated the two cases discussed above: (a) the original action brought by the Palm Beach County Canvassing Board asking the court to resolve the conflicting advisory opinions issued by the Division of Elections and the Attorney General; and (b) the appeal from the Leon County Circuit Court's decision that the Secretary of State had not abused her discretion in deciding not to include results from manual recounts filed after the 5:00 p.m. November 14 deadline in the statewide tabulation.

A. The State Court's Decision

On Friday, November 17, 2000, the Florida Supreme Court *sua sponte* enjoined the Secretary of State from certifying the November 7 presidential election results for the State of Florida until further order from the Court. App., *infra*, 40a-41a. On Monday, November 20, after weekend briefing by the parties, the court heard oral argument.

Late on the evening of November 21, 2000, the Florida Supreme Court issued its opinion reversing the orders of the state trial court. App., *infra*, 1a-39a. The supreme court held that the trial court "erred in holding that the Secretary [of State] acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts." App., *infra*, 35a. The supreme court reached this conclusion by announcing a new rule of law to constrain the Secretary's discretion under Fla. Stat. §§ 102.111 and 102.112, declaring for the first time that "the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." *Id.* at 37a. Based on this newly fashioned, hitherto unrecognized rule of law, the Florida Supreme Court directed the Secretary of State to accept untimely manual recount returns through Sunday, November 26, 2000. *Id.* at 38a-39a. Moreover, the court maintained its injunction preventing the Secretary from certifying any election results by that date, and directed the Secretary to include in her certified election results all manual recount returns received by that date. *Id.* at 39a.

B. The Federal Issues Were Raised And Ruled On Below

Each of the issues presented by this petition was expressly raised in the court below. *First*, petitioners argued that a *post hoc* judicial decision on the appointment of electors would violate 3 U.S.C. § 5, which requires that any such disputes be resolved in accordance with laws enacted prior to election day. Bush Answer Br. 42-43; App., *infra*, 62a. *Second*, petitioners contended that any decision overriding the Florida legislature's procedures for appointing electors (including the November 14 deadline for certifying votes) would violate Article II, which vests sole authority over such matters in the legislatures of the several States. Bush Answer Br. 43 n.15; App., *infra*, 62a-63a, n.15. And *third*, petitioners argued that the manual recount being sought by the Gore faction would "violat[e] the United States Constitution," by diluting votes in violation of the Due Process and Equal Protection Clauses, by allowing standardless decision-making in the voting arena in violation of the Due Process Clause, and by impairing the right of association through voting in violation of the First Amendment. Bush Answer Br. 43-44; App., *infra*, 63a-64a.

As noted above, the Supreme Court of Florida did not expressly rule on petitioner's federal claims. Be-

cause the judgment below necessarily rejects those federal claims on the merits, however, those federal questions are squarely presented here.

REASONS FOR GRANTING THE PETITION

Few issues could be more important than those presented in this case. At stake is the lawful resolution of a national election for the office of President of the United States. As this Court has often recognized, the American public's right to vote is one of the most sacred protected by our Constitution: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). The Florida Supreme Court's decision poses a clear and present danger to that right, and should be corrected forthwith to ensure that our Nation continues to be governed by the rule of law.

The choosing of presidential electors is a matter of great national importance and interest. As this Court stated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Id.* at 794-95. Given the national significance of the Florida election results, it is essential that the counting of ballots be conducted in a fair and consistent manner in accordance with established Florida law. Counties in Florida, however, have undergone a blatantly arbitrary, subjective, and standardless process in attempting to count ballots by hand in an effort to divine the intent of the voters. The Nation's citizens have witnessed this standardless process unfold as they anxiously await a resolution of the election outcome. By retroactively changing the law in Florida through judicial intervention, the Supreme Court of Florida's decision preventing the Secretary of State of Florida from exercising her legislatively conferred authority to perform the act of certification that would complete the electoral process in Florida has added to that angst and has strayed from established federal constitutional and statutory law.

Governor George W. Bush and Dick Cheney received the most votes cast in Florida, as initially counted, as recounted, and as retabulated again after receipt of overseas ballots. Nevertheless, the Secretary of State of Florida has been precluded from certifying these results or appointing electors in accordance with that popular vote, pending the completion of an arbitrary, standardless and selective manual recount of ballots cast in three heavily populated, predominantly Democratic counties in Florida.

This Court's review of the Supreme Court of Florida's decision is warranted because it "decided an important federal question that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c); it "decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals," Sup. Ct. R. 10(b); and it "decided an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c). As discussed in greater detail below, this case presents important questions regarding the federal statutory and constitutional restraints on the ability of States to impose *post hoc* requirements on the appointment of presidential electors, and to change requirements for the resolution of controversies concerning the appointment of electors. The decision below also conflicts with precedents of this Court and the court of appeals regarding the scope of the First and Fourteenth Amendment protections for the funda-

mental right to vote. Moreover, these important questions are presented in the context of one of the closest elections for President in our Nation's history.

There is a profound national interest in ensuring the fairness and finality of elections, particularly an election for the highest office in the land. This is precisely the type of question that the Nation justifiably expects this Court to decide. Indeed, absent a decision by this Court, the election results from Florida could lack finality and legitimacy. The consequence may be the ascension of a President of questionable legitimacy, or a constitutional crisis. Quite simply, this is the sort of case that this Court should unquestionably hear.

I. Review Is Warranted In This Case Because The Florida Supreme Court Disregarded Federal Law Governing Disputes Over The Appointment Of Electors

Although election procedures are often governed exclusively by state law, that is not the case in elections for the members of the Electoral College, who choose the President and Vice President of the United States. While some of the details of appointing presidential electors are left to the several States, the basic framework is established by the Constitution itself, in Section 1 of Article II and the Twelfth Amendment. Moreover, Congress has enacted legislation to implement the constitutional framework, and those federal laws, of course, reign supreme over state laws in this area. U.S. CONST., art. VI, cl. 2.

In particular, Congress has provided that when "any controversy or contest concerning the appointment of all or any of the electors" from a State arises, the dispute must be resolved exclusively by reference to "laws enacted *prior to*" election day. 3 U.S.C. § 5 (emphasis added). The evident purpose of this federal law is to ensure that the applicable rules cannot be changed once the voters have gone to the polls. As Representative William Craig Cooper of Ohio explained in the congressional debate on this provision (Act of Feb. 3, 1887, ch. 90, § 2, 24 Stat. 373), "these contests, these disputes between rival electors, between persons claiming to have been appointed electors, should be settled under a law made prior to the day when such contests are to be decided." 18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper); *see also id.* ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose"); *id.* ("How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?"). Representative Cooper's concerns, although expressed more than a century ago, seem remarkably prescient when read against the backdrop of events of the past fifteen days in Florida. As he asked rhetorically, in opposing the views of congressional Democrats who wished to permit the use of retroactive rulemaking to resolve electoral disputes: "To what anarchy, to what confusion, to what riot, if you please, Mr. Speaker, might such a course of procedure lead!" *Id.*

Despite the express federal statutory prohibition against the *post hoc* creation of new legal rules to affect the outcome of controversies over the appointment of presidential electors, the Supreme Court of Florida has authorized a clear departure from the established legal requirements set forth by the Florida Legislature that were in place on November 7. Prior to election day 2000, the Florida Legislature had enacted clear legislative directives regarding the certification of votes cast in the Presidential election. Under § 102.111 of the Florida Statutes, for example, election returns by county canvassing boards "must be filed by 5:00 p.m. on the 7th day following the . . . general election . . . ." By contrast, under the new rule of law announced by the decision below, the effective deadline for submission of election returns has been extended from November 14

until November 26 (App., *infra*, 37a), nearly tripling the statutory seven-day time period mandated by the Florida Legislature.

In addition, § 102.112 of the Florida Statutes provides that the Elections Canvassing Commission "shall . . . ignore[]" county returns filed after 5:00 p.m. on the seventh day following the election, and "shall . . . certif[y]" the election based on the results returned before the deadline. Section 102.111(1) confirms that late-filed returns "may be ignored" by the Elections Canvassing Commission.[3] *See* Fla. Stat. § 102.112. Notwithstanding this clear, and preexisting, legislative directive, the Supreme Court of Florida has now concluded retroactively that the Elections Canvassing Commission could

[3] Section 102.112(1) of the Florida statutes provides that if election returns are not received by the Department of State by 5:00 p.m. on the seventh day following the election, the returns "may be ignored." This statute, enacted in 1989, appears to have been passed in response to the Supreme Court of Florida's decision in *Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988). In *Chappell*, one of the six counties in the Fourth Congressional District failed to submit its original certificate until two days after the statutory deadline in § 102.111. The county had, however, informed the Department of State by telephone of its results prior to the deadline. The supreme court ruled that the county had substantially complied with § 102.111 and thus allowed the county's votes to count. *See Chappell*, 536 So. 2d at 1008-09. In passing § 102.112, however, the State Legislature did not repeal § 102.111. Nor does this case involve a situation like that at issue in *Chappell*, in which a county conducting a recount informed the Department of State of its results prior to the deadline, but simply failed to submit its official results in writing by the deadline. In any event, as discussed below, § 102.112 states that late results *may* be ignored, not that such results *may not* be ignored, as the Florida Supreme Court has now directed.

not ignore late-filed returns, but *must* hold the results of a national election open for an additional extended period of time, pending the completion of selective manual recounts in individual counties. App., *infra*, 34a-37a.

In addition, the judicially established waiver of the statutory deadline contained in § 102.112, is contrary to the legislative provisions contained in § 102.168 providing for contests to election results. *See* Fla. Stat. § 102.168. That statute clearly anticipates that results will be certified in a timely fashion, in order for the results to be contested in court. Pushing back the deadline for certification by judicial fiat thus runs headlong into the Florida Legislature's intent to allow a period of time for court challenges.

The Supreme Court of Florida's decision also deviated from its prior decisions making clear that the "judgments" of officials such as the Secretary of State in fulfilling their specifically charged duties in the election process "are entitled to be regarded by the courts as presumptively correct." *Krivanek v. The Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993) (quoting *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (Fla. 1975)); *see also Greyhound Lines, Inc. v. Yarborough*, 275 So. 2d 1, 3 (Fla. 1973) ("This Court has often reiterated the principle that a construction of a statute by the administrative body in whom authority to administer is reposed is entitled to great weight and should not be overturned unless clearly contrary to the language of the statute."). This arbitrary judicial departure from the well-established law of Florida—as it plainly stood prior to November 7, 2000—is in flagrant violation of Congress's federally imposed requirement that controversy over the appointment of electors be resolved solely un-

der legal standards "enacted prior to" the date of the election. 3 U.S.C. § 5.[4]

Even if the Secretary of State *might* be authorized to excuse county board noncompliance with the 5:00 p.m. November 14 deadline (*see* Fla. Stat. § 102.112), nothing in Florida law as it existed before November 7, 2000, *required* that she do so, and certainly there was no preexisting rule of Florida law that mandated that result in the circumstances presented here. The Florida Legislature directly contemplated close elections when it enacted the controlling statutory provisions at issue here. Indeed, the State's legislative body required that when the margin of victory in an election is less than .5 percent, an automatic statewide recount is to be held. *See* Fla. Stat. § 102.141(4). The Florida Legislature also contemplated that manual recounts might be requested by candidates or parties (but not by voters) in some circumstances, but established no standards to guide the discretion of county canvassing boards in determining whether to conduct such manual recounts *See* Fla. Stat.

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[4] The Supreme Court of Florida purported to follow prior Florida case law in reaching its decision but that claim is manifestly without foundation. Under 3 U.S.C. § 5, of course, this Court has an independent obligation to ensure that Florida resolves any controversies over appointment of electors by reference to the rules of law enacted prior to the election, not *post hoc* standards announced for the first time some two weeks after the election. Moreover, this Court has repeatedly recognized that when a state court rests its decision on a nonfederal ground that "is so plainly unfounded that it may be regarded as essentially arbitrary," such action does not remove consideration of the federal question from this Court's jurisdiction. *See McCoy v. Shaw*, 277 U.S. 302, 303 (1928); *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 454-55 (1958).

§ 102.166(4)(c). In passing §§ 102.111 and 102.112, however, the legislature plainly determined that finality had an important place in the certification process as well.

The Florida Legislature thus consciously weighed the interests of finality against competing interests supporting manual recounts. It is clear from the legislative enactments that the court struck the balance between finality and manual recounts in such a way that ongoing manual recounts do not warrant abandoning the statutorily imposed deadline found in §§ 102.111 and 102.112, unless, in the most permissive reading of the statutes, the Secretary of State decides in her lawfully granted discretion that such late-filed returns should be included in the final election results. Where, as here, no preexisting rule of law required (or even authoritatively authorized) the Secretary of State to waive the time limit on the facts presented, 3 U.S.C. § 5 precludes the retroactive enforcement of a new rule of law compelling that previously unknown result.

The federal rule enunciated by Congress in 3 U.S.C. § 5 serves obvious and important public policy interests by prohibiting precisely what is happening in Florida today, where the candidate who did not receive the most votes and his supporters are attempting to overturn the results of the Presidential election by changing the rules after the election has been held. Section 5's prohibition against such retroactive rulemaking in the election context provides a statutory corollary to the principle of federal constitutional law recognized by the Eleventh Circuit in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). As the court of appeals held in that case, constitutional principles of due process and fundamental fairness preclude the States from adopting "a post-election departure from previous practice" and applying that post-election rule retroactively to determine the outcome of an election. *Id.* at 581. Here, as in *Roe*, "had the candidates . . . known" that the state supreme court would retroactively

extend the deadline for submission of election returns notwithstanding the plain language of the governing statutes, "campaign strategies would have taken this into account . . . ." *Id.* at 582. Indeed, the candidates' decisions whether to seek a manual recount in specific additional counties might well have been affected had petitioner and other candidates known that the Florida Supreme Court would subsequently extend the statutory deadline nearly threefold.

The application of 3 U.S.C. § 5 in these circumstances is straightforward. Perhaps because no candidate has previously resisted so strenuously and resourcefully, the certification of election results as has Vice President Gore, this Court has not previously been called upon to decide whether or not the States must adhere to preexisting law in resolving election disputes. But the plain language of the federal statute indicates that they *must* do so, and it is also plain that the Florida Supreme Court failed to do so. Given the importance of the issue to the Nation, this is not a question that can await further development in the lower courts. The Court should decide—now—whether or not Congress meant what it said when it directed that controversies concerning the appointment of electors be decided only "by laws enacted prior to" election day. 3 U.S.C. § 5; *see* Sup. Ct. R. 10(c) (including among the considerations supporting review in this Court, state court decisions that decide "an important question of federal law that has not been, but should be, settled by this Court"). If Congress did, then the judgment below must be reversed.

II. Review Is Warranted Because The Court Below Disregarded Constitutional Limitations On The Appointment Of Electors

The congressional directive that States decide controversies concerning electors according to "laws enacted prior to" election day (3 U.S.C. § 5) is derived from the constitutional command that each State appoint

electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. Significantly, the Framers did not see fit to leave the mechanics of electoral appointment to either the judicial or executive branch of the several States, but instead entrusted the legislative arm—the one, as in the federal government, most representative of the popular will—with authority to articulate the standards by which electors would be chosen.

In Florida, the "manner" in which the legislature has directed that electors be appointed is quite clear. The citizens vote for them on Election Day (which is established by federal law), and the various counties must certify the results of the election to the state Division of Elections by 5:00 p.m. the following Tuesday. Fla. Stat. § 102.112. As soon as practicable thereafter, the legislature has commanded that the results of the election "shall" (or at least "may") be certified, while the results from any counties not reporting before the statutory deadline "shall" (or, again, at least "may") be ignored. Fla. Stat. §§ 102.111, 102.112. Notably, the creation of this timetable intentionally leaves time for election contests, as the legislature clearly provided for in § 102.168. Under this legislative directive, the results in Florida—as all acknowledge—are clear: The electors for the Republican candidates garnered more votes before the statutory deadline, and that outcome did not change when the results of absentee balloting (which, under federal law, must be counted notwithstanding the state deadline) were considered.

The Florida Supreme Court has seen fit to revise the "manner" in which Florida's electors are chosen by directing the Secretary of State to consider results from those counties that are conducting manual recounts, notwithstanding the fact that the statutory deadline has long since passed and no waiver of that deadline has been granted by the State agency authorized by the legislature to grant such relief: the Elections Canvassing

Commission. The Constitution admits of no such *post hoc* alterations to the scheme of electoral appointments. Had the Florida legislature seen fit to vest the decision in the hands of the judiciary, presumably it could have done so; but the simple fact is that it did *not* do so.

It is no accident that Article II reserves the manner of selecting electors to the *legislatures* of the several States. As this Court has explained, "[t]hat was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purposes of interpretation. A Legislature was then the representative body which made the laws of the people." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And then, as now, a legislature was *not* a state court, sitting after the fact to decide what rules should be adopted and applied. Rather, by requiring the legislative branch to set forth the manner in which electors would be chosen, the Framers undoubtedly wanted to ensure that the rules would be specified in advance in order that there could be no doubt that their application in particular circumstances was reflective of the will of the people. The events in Florida have only confirmed the wisdom of the constitutional design, faithful adherence to which requires that this Court review the Florida Supreme Court's usurpation of legislative power in defiance of the Constitution's plan.

III. Review Is Warranted Because The Supreme Court Of Florida's Decision Conflicts With This Court's And Eleventh Circuit Precedent And The Recount Procedures Sanctioned By The Court Below Do Not Pass Constitutional Muster

The Florida Supreme Court's decision opens the door to an electoral catastrophe. The court below has essentially given the green light to a standardless exercise in which vote-counters in a few, carefully selected counties will divine the "intent of the electorate" without

any legislative guidance or uniform standards. The process therefore varies from county to county, and criteria for counting ballots as votes has changed repeatedly in each recount county. Voters in counties not selected for recount will have ballots tabulated pursuant to wholly different, less permissive standards. The results of such lawlessness cannot be squared with fundamental principles of our constitutional structure.

When it became apparent that some Florida officials were bent on paving the road to chaos that the state supreme court has now endorsed, Governor Bush and Secretary Cheney, and various Florida voters, sought an injunction in federal court. Both the district court and the court of appeals denied their request for an interlocutory injunction, although the appellate court did not foreclose the possibility of appropriate relief if necessary. Petitioner Bush, among others, has petitioned this Court for review of the federal case (*Siegel v. LePore*, No. 00-___, filed contemporaneously herewith), which raises the same fundamental due process and equal protection constitutional questions as does the Florida Supreme Court's decision. Since those questions are addressed more fully in that petition, which is being submitted to the Court concurrently with this one, Petitioner will only summarize the constitutional problems here.

A. Equal Protection

The dilution of the weight of a citizen's vote constitutes a denial of the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). As a result, the Equal Protection Clause demands that the votes of similarly situated voters be given similar effect. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974); *Roman v. Sincock*, 377 U.S. 695 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). Florida's selective manual recount procedures, as approved by the court below, arbitrarily treat voters differently simply because they happen to live in different parts of the State, and accordingly conflict with prece-

dent of this Court cited above. A partially punched ballot, for example, may not be counted at all in most counties, might be counted as a vote in other counties, and in some counties it might be counted as a vote or not—depending on which set of ever-changing rules the election officials happen to be applying at the time it is reviewed. This has the effect not only of arbitrarily denying the right to vote to some persons, but of diluting the votes of the majority of Floridians who correctly cast their ballots. Either way, the present regime cannot withstand equal protection analysis.

The Supreme Court of Florida's decision cannot be reconciled with this Court's opinion in *O'Brien*, in which it struck down a New York law that allowed an inmate incarcerated outside of his home county to cast an absentee ballot, while not allowing a similarly situated inmate to cast a ballot when incarcerated within his home county. *See O'Brien*, 414 U.S. at 528-30. The manual recount scheme condoned by the Supreme Court of Florida suffers from failings similar to those contained in the New York law struck down in *O'Brien*. The right of a citizen to vote, and to have that vote counted equally to the votes of others similarly situated, cannot be infringed on the sole basis of the county in which the citizen resides, anymore than on the basis of the county in which a prisoner is incarcerated. Because the Supreme Court of Florida's decision "conflicts with [a] relevant decision[] of this Court," review is warranted. Sup. Ct. R. 10(c).

The decision below also directly conflicts with the Eleventh Circuit's decision in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). The court below held that conducting manual recounts in selected Democratic counties in the State long past the seven-day deadline imposed by state law and in a manner flatly inconsistent with the authoritative interpretation of the law by the state official charged with enforcing it does not violate the federal Constitution. In *Roe*, by contrast, as discussed above, the Eleventh Circuit held that to change the voting rules after election day and thus count some votes that should not be counted would unconstitutionally dilute the votes of those who complied with the established voting requirements. *Id.* at 581-82. In this case, conducting a manual recount in selected counties with no established standards in place to determine whether to conduct such manual recounts and, if so, what procedures to follow, subjects identically situated voters to different treatment solely on account of the county in which they reside. To include ballots in the final statewide tally that were counted solely because they were subjected to the different scrutiny attendant to a manual recount, would be as improper in this case as counting the noncompliant ballots at issue in *Roe*. As in *Roe*, the counting of ballots that should not be counted will unconstitutionally dilute the votes of those who properly cast their ballots on election day and those who do not live in the counties selected for a manual recount. In addition to being erroneous as a general matter, therefore, the Supreme Court of Florida's decision also fails to comport with the Eleventh Circuit's holding in *Roe*. This conflict further supports review in this Court. Sup. Ct. R. 10(b).

B. Due Process

The manual recount underway in certain Florida counties is unconstitutional because it is being conducted in the absence of meaningful objective standards. The officials responsible for overseeing the turmoil and constantly changing process that the nation has been watching for the past two weeks have failed to articulate rules for when a recount will be ordered, how long it will take, how it will be conducted, what votes will (and will not) be counted, and so on. This uncertainty derives from the fact that Florida law provides no meaningful guidance to help local canvassing boards determine whether to conduct a manual recount and, if so, the process to follow in determining whether to count any

given ballot. The only "standard" conceivably contained in the Florida statutes is the extremely general one that canvassing board's are to attempt "to determine the voter's intent." Fla. Stat. § 102.166(7). This vague statement of generalized purpose absolutely fails to provide any meaningful guide for local canvassing boards to follow in determining *how* to divine the voter's intent.

This total lack of guidance has, not surprisingly, led counties to apply different "standards" to the evaluation process, and, moreover, to the extent such standards have been announced, they have been renounced or changed within minutes or hours. Two counties that voted not to proceed with county-wide manual recounts reversed those decisions within days. The result is a chaotic, and entirely standardless and arbitrary, regime in which a question of national importance is being decided by government actors wholly unconstrained by limits or standards. It does not comport with the minimum standards of due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Moreover, counties have even departed from their past practices in conducting manual recounts. For example, the Broward County Canvassing Board has previously rejected the *need* for a manual recount in a situation strikingly similar to this one. In 1991, after an initial machine recount of the votes cast in a local city council race changed the margin of victory from five votes to three, the Board declined to conduct a manual recount. The Board concluded that the change in numbers was simply the result of "hanging paper chads" that fell away in the second count, causing two ballots initially counted for the victor to become overvotes (and thus no vote) because holes were actually punched for two candidates. *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. Dist. Ct. App. 1992). The Board determined that such "voter errors . . . are caused by hesitant piercing, no piercing, or intentional or unintentional multiple piercing of computer ballot

cards," and did not warrant a manual recount. *See id.*[5] Despite this prior practice of not conducting manual recounts in cases where a discrepancy between the initial count and a machine recount was due to this kind of "voter error," Broward County opted to change course and conduct a manual recount in this case.

Similarly, Palm Beach County is reportedly considering reversing course from its prior guidelines to count so-called "dimpled" chads. *See* Dan Balz, *Bush Spurns Gore Recount Plan; Fla. Official Rejects New Tallies*, WASH. POST, Nov. 16, 2000, at A1; Don Van Natta, Jr., *Dimpled Votes Are New Hope For Democrats*, N.Y. TIMES, Nov. 22, 2000, at A1, *available at* http://www.nytimes.com/2000/11/22/politics/22DISP.html?pagewanted=2. In the Palm Beach County guidelines on counting ballots issued in November 1990, however, the County Canvassing Board made clear that "a chad that is fully attached, bearing only an indentation, should not be counted as a vote." *See* Guidelines on Ballots With Chads Not Completely Removed, Adopted by the November 6, 1990 Canvassing Board.

The Eleventh Circuit made clear in *Roe* that changing the rules after an election to count ballots that historically had not been counted violates the Due Process Clause. *See Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995). Nonetheless, this is precisely what Broward County and Palm Beach County are doing: They are engaged in a "post-election departure from [their] previous practice[s]." *Id.* at 581. This change in approach in determining whether to conduct a manual recount and, if so, how to count ballots, stands in direct conflict with

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[5] The Fourth District Court of Appeals for Florida upheld the Board's decision not to conduct a manual recount in the *Hogan* case. *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992).

the Eleventh Circuit's holding in *Roe*. Furthermore, these changes underscore the utter lack of standards in the Florida statute to guide local canvassing boards and the unconstitutional nature of the manual recounts that the Supreme of Court of Florida has approved.

C. First Amendment

Voting is expressive and associational activity protected by the First Amendment. *Williams v. Rhodes*, 393 U.S. 23 (1968). The arbitrary and standardless recounting regime approved by the Florida Supreme Court, however, violates the First Amendment rights of those Floridians who voted. It raises some citizens' voices above others, and drowns out still others. It distorts, and dilutes, the expression of political will that the people of Florida made on November 7—and which has been confirmed in subsequent recounts. It threatens to subvert the views of the many to those of the few, whose votes—after being reviewed according to no discernible, much less articulable, standards—are deemed by interested local officials to have more value than those cast in the rest of the State. The First Amendment cannot withstand such governmental overreaching.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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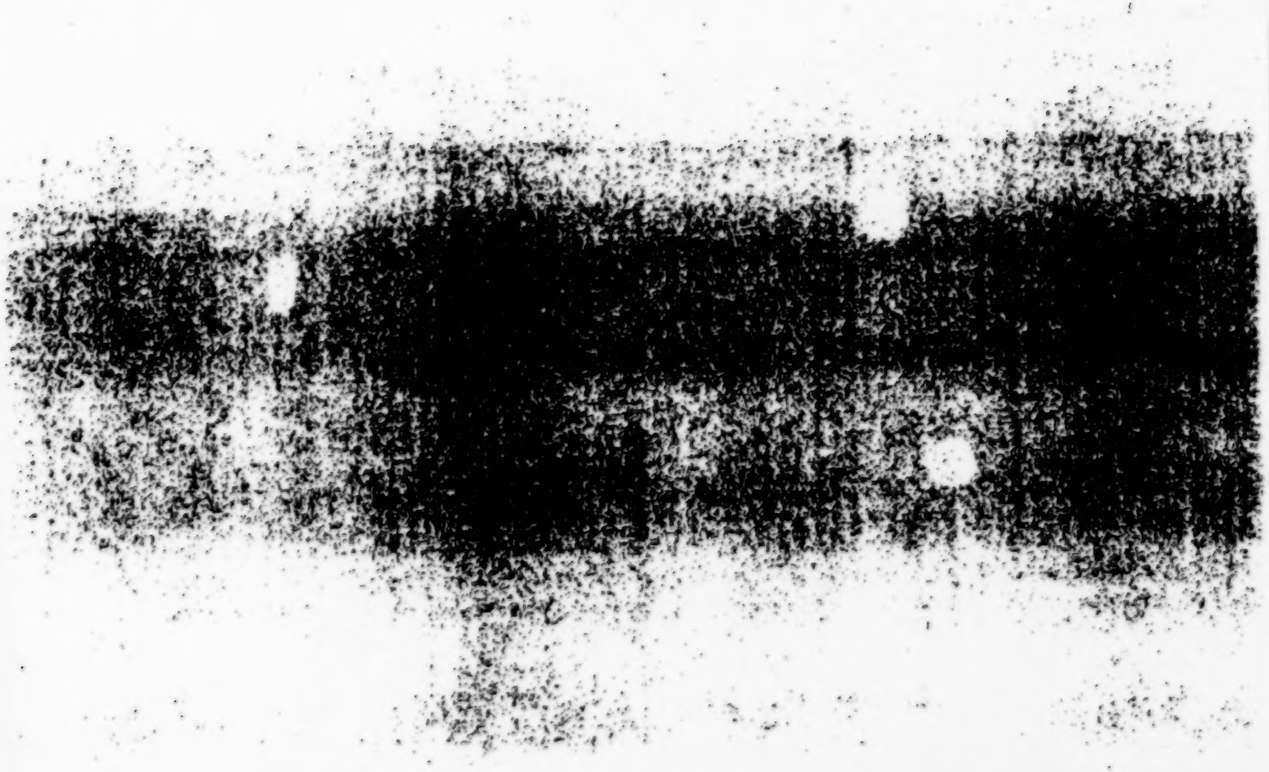
APPENDIX



APPENDIX A

SUPREME COURT OF FLORIDA

Nos. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, ETC., ET AL.
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, ET AL.,
Appellants,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

[November 21, 2000]

PER CURIAM.

We have for review two related trial court orders appealed to the First District Court of Appeal, which certified the orders to be of great public importance requiring immediate resolution by this Court (Case Numbers SC00-2348 and SC00-2349). We have jurisdiction under article V, section 3(b)(5) of the Florida Constitution. For the reasons set forth in this opinion, we reverse the orders of the trial court.[1]

I. FACTS

A. The Election

On Tuesday, November 7, 2000, the State of Florida, along with the rest of the United States, conducted a general election for the President of the United States. The Division of Elections ("Division") reported on Wednesday, November 8, that George W. Bush, the Republican candidate, had received 2,909,135 votes, and Albert Gore Jr., the Democratic candidate, had received 2,907,351 votes. Because the overall difference in the total votes cast for each candidate was less than one-half of one percent of the total votes cast for that office (i.e., the difference was 1,784 votes), an automatic recount was conducted pursuant to section

[1] The Palm Beach County Canvassing Board has filed in this Court an "Emergency Petition for Extraordinary Writ" against Secretary of State Katherine Harris and others (Case Number SC00-2346). We have examined our jurisdiction under article V, section 3(b)(8) of the Florida Constitution. However, because the issue raised by that separate petition can be disposed of in our pending case and because we have previously stated in our order of November 16, 2000, that there was "no legal impediment" to the manual recounts continuing, we deem it unnecessary to determine if we have a separate basis of jurisdiction for entertaining the writ. Accordingly, by separate order we dismiss the petition.

102.141(4), Florida Statutes.[2] The recount resulted in a substantially reduced figure for the overall difference between the two candidates.

In light of the closeness of the election, the Florida Democratic Executive Committee on Thursday, November 9, requested that manual recounts be conducted in Broward, Palm Beach, and Volusia Counties pursuant to section 102.166, Florida Statutes (2000).[3] Pursuant to section 102.166(4)(d), the county canvassing boards of these counties conducted a sample manual recount of at least one percent of the ballots cast. Initial manual recounts demonstrated the following: In Broward County, a recount of one percent of the ballots indicated a net increase of four votes for Gore; and in Palm Beach County, a recount of four sample precincts yielded a net increase of nineteen votes for Gore. Based on these recounts, several of the county canvassing boards determined that the manual recounts conducted indicated "an error in the vote tabulation which could affect the outcome of the election." Based on this determination, several canvassing boards voted to conduct countywide manual recounts pursuant to section 102.166(5)(c).

[2] Section 102.141(4), Florida Statutes (2000), provides in pertinent part:

> (4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office . . . the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure.

[3] We have not discussed the events in Miami-Dade County because Miami-Dade is not a party nor has it sought to intervene in this case.

B. The Appeal Proceedings

Concerned that the recounts would not be completed prior to the deadline set forth in section 102.111(1), Florida Statutes (2000), requiring that all county returns be certified by 5 p.m. on the seventh day after an election, the Palm Beach County Canvassing Board, pursuant to section 106.23, Florida Statutes (2000), sought an advisory opinion from the Division of Elections, requesting an interpretation of the deadline set forth in sections 102.111 and 102.112. The Division of Elections responded by issuing Advisory Opinion DE 00-10, stating that absent unforseen circumstances, returns from the county must be received by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.

Relying upon this advisory opinion, the Florida Secretary of State (the Secretary) issued a statement on Monday, November 13, 2000, that she would ignore returns of the manual recounts received by the Florida Department of State (the Department) after Tuesday, November 14, 2000, at 5:00 p.m. The Volusia County Canvassing Board (the Volusia Board) on Monday, November 13, 2000, filed suit in the Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking declaratory and injunctive relief, and the candidates and the Palm Beach County Canvassing Board (the Palm Beach Board), among others, were allowed to intervene. In its suit, the Volusia Board sought a declaratory judgment that it was not bound by the November 14, 2000, deadline and also sought an injunction barring the Secretary from ignoring election returns submitted by the Volusia Board after that date.

The trial court ruled on Tuesday, November 14, 2000, that the deadline was mandatory but that the Volusia Board may amend its returns at a later date and that the Secretary, after "considering all attendant facts and circumstances," may exercise her discretion in

determining whether to ignore the amended returns.[4] Later that day, the Volusia Board filed a notice of appeal of this ruling to the First District Court of Appeal, and the Palm Beach Board filed a notice of joinder in the appeal.

Subsequent to the circuit court's order, the Secretary announced that she was in receipt of certified returns (i.e., the returns resulting from the initial recount) from

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[4] The trial court's order reads in part:

> The County Canvassing Boards are, indeed, mandated to certify and file their returns with the Secretary of State by 5:00 p.m. today, November 14, 2000. There is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of State, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored. Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to include or to ignore the late filed returns in certifying the election results and declaring the winner.
>
> Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly exercise her discretion in making a decision on the returns, but I cannot enjoin the Secretary to make a particular decision, nor can I rewrite the Statute which, by its plain meaning, mandates the filing of returns by the Canvassing Boards by 5:00 p.m. on November 14, 2000.

McDermott v. Harris, No. 00-2700, unpublished order at 7 (Fla. 2d Cir. Ct. Nov. 14, 2000).

all counties in the State. The Secretary then instructed Florida's Supervisors of Elections (Supervisors) that they must submit to her by 2 p.m., Wednesday, November 15, 2000, a written statement of "the facts and circumstances" justifying any belief on their part that they should be allowed to amend the certified returns previously filed. Four counties submitted their statements on time. After considering the reasons in light of specific criteria,[5] the Secretary on Wednesday,

[5] The criteria considered by the Secretary are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. *In re Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. *McDermott v. Harris*, No. 00-2700 (Fla. 2d Cir. Ct. Nov. 14, 2000).

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of

[Footnote continued on next page]

November 15, 2000, rejected the reasons and again announced that she would not accept the amended returns but rather would rely on the earlier certified totals for the four counties. The Secretary further stated that after she received the certified returns of the overseas absentee ballots from each county, she would certify the results of the presidential election on Saturday, November 18, 2000.

On Thursday, November 16, 2000, the Florida Democratic Party and Albert Gore filed a motion in Circuit Court of the Second Judicial Circuit in Leon County, Florida, seeking to compel the Secretary to accept amended returns. After conducting a hearing, the court denied relief in a brief order dated Friday, November 17, 2000.[6] That day, both the Democratic

[Footnote continued from previous page]

the voters. *Beckstrom. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("[M]ere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.").

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000).

[6] The court's order reads in part:

On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to

[Footnote continued on next page]

Party and Gore appealed to the First District Court of Appeal, which consolidated the appeals with the Volusia Board's appeal already pending there, and certified both of the underlying trial court orders to this Court based on the Court's "pass-through" jurisdiction.[7] By orders dated Friday, November 17, 2000, this Court accepted jurisdiction, set an expedited briefing schedule, and enjoined the Secretary and the Elections Canvassing Commission (Commission) from certifying the results of the presidential election until further order of this Court.[8]

II. GUIDING PRINCIPLES

Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases:

[Footnote continued from previous page]

> determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My order requires nothing more.

McDermott v. Harris, No. 00-2700, unpublished order at 2 (Fla. 2d Cir. Ct. Nov. 17, 2000).

[7] *See* Art. V, § 3(b)(5), Fla. Const. ("[The Court may] review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance . . . and certified to require immediate resolution by the supreme court.").

[8] Subsequently, the Volusia Board moved to voluntarily dismiss its appeal in this Court. The Court granted the motion, but indicated that the case style would remain the same and that Gore and the Palm Beach Board "would continue as intervenors/appellants in this action."

> [T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and of upmost importance to the people, thus subordinating their interest to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. *The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.* We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975) (emphasis added). We consistently have adhered to the principle that the will of the people is the paramount consideration.[9] Our goal today remains the

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[9] *See State ex rel.Chappell v. Martinez*, 536 So. 2d 1007, 1009 (Fla. 1988) (holding that disenfranchisement of voters is not proper where there has been substantial compliance with the election statute and the intent of voter can be ascertained); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 726 (Fla. 1998) (holding that courts should not frustrate will of voters if that will can be determined).

same as it was a quarter of a century ago, i.e., to reach the result that reflects the will of the voters, whatever that might be. This fundamental principle, and our traditional rules of statutory construction, guide our decision today.

III. ISSUES

The questions before this Court include the following: Under what circumstances may a Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary and Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?[10]

IV. LEGAL OPINION OF THE DIVISION OF ELECTIONS

The first issue this Court must resolve is whether a County Board may conduct a countywide manual recount where it determines there is an error in vote tabulation that could affect the outcome of the election. Here, the Division issued opinion DE 00-13, which construed the language "error in vote tabulation" to exclude the situation where a discrepancy between the original machine return and sample manual recount is due to the manner in which a ballot has been marked or punched.

Florida courts generally will defer to an agency's interpretation of statutes and rules the agency is charged

[10] Neither party has raised as an issue on appeal the constitutionality of Florida's election laws.

with implementing and enforcing.[11] Florida courts, however, will not defer to an agency's opinion that is contrary to law.[12] We conclude that the Division's advisory opinion regarding vote tabulation is contrary to law because it contravenes the plain meaning of section 102.166(5).

Pursuant to section 102.166(4)(a), a candidate who appears on a ballot, a political committee that supports or opposes an issue that appears on a ballot, or a political party whose candidate's name appeared on the ballot may file a written request with the County Board for a manual recount. This request must be filed with the Board before the Board certifies the election results or within seventy-two hours after the election, whichever occurs later.[13] Upon filing the written request for a manual recount, the canvassing board may authorize a manual recount.[14] The decision whether to conduct a manual recount is vested in the sound discretion of the Board.[15] If the canvassing board decides to authorize the manual recount, the recount must include at least three precincts and at least one percent of the total votes cast for each candidate or issue, with the person who requested the recount choosing the precincts to be recounted.[16] If the manual

[11] *See Donato v. American Tel. & Tel.Co.*, 767 So. 2d 1146, 1153 (Fla. 2000); *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994).

[12] *See Donato*, 767 So. 2d at 1153; *Nikolits v. Nicosia*, 682 So. 2d 663, 666 (Fla. 4th DCA 1996).

[13] § 102.166(4)(b), Fla. Stat. (2000).

[14] § 102.166(4)(c), Fla. Stat. (2000).

[15] *See Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

[16] *See* § 102.166(4)(d), Fla. Stat. (2000).

recount indicates an "error in the vote tabulation which could affect the outcome of the election," the county canvassing board "shall":

> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; *or*
>
> (c) Manually recount all ballots.

§ 102.166(5)(a)-(c), Fla. Stat. (2000) (emphasis added).

The issue in dispute here is the meaning of the phrase "error in the vote tabulation" found in section 102.166(5). The Division opines that an "error in the vote tabulation" only means a counting error resulting from incorrect election parameters or an error in the vote tabulating software. We disagree.

The plain language of section 102.166(5) refers to an error in the vote tabulation rather than the vote tabulation system. On its face, the statute does not include any words of limitation; rather, it provides a remedy for any type of mistake made in tabulating ballots. The Legislature has utilized the phrase "vote tabulation system" and "automatic tabulating equipment" in section 102.166 when it intended to refer to the voting system rather than the vote count. Equating "vote tabulation" with "vote tabulation system" obliterates the distinction created in section 102.166 by the Legislature.

Sections 101.5614(5) and (6) also support the proposition that the "error in vote tabulation" encompasses more than a mere determination of whether the vote tabulation system is functioning. Section 101.5614(5) provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."

Conversely, section 101.5614(6) provides that any vote in which the Board cannot discern the intent of the voter must be discarded. Taken together, these sections suggest that "error in the vote tabulation" includes errors in the failure of the voting machinery to read a ballot and not simply errors resulting from the voting machinery.

Moreover, section 102.141(4), which outlines the Board's responsibility in the event of a recount, states that the Board "shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast." § 102.141, Fla. Stat. (2000) (emphasis added). Therefore, an "error in the vote tabulation" includes a discrepancy between the number of votes determined by a voter tabulation system and the number of voters determined by a manual count of a sampling of precincts pursuant to section 102.166(4).

Although error cannot be completely eliminated in any tabulation of the ballots, our society has not yet gone so far as to place blind faith in machines. In almost all endeavors, including elections, humans routinely correct the errors of machines. For this very reason Florida law provides a human check on both the malfunction of tabulation equipment and error in failing to accurately count the ballots. Thus, we find that the Division's opinion DE 00-13 regarding the ability of county canvassing boards to authorize a manual recount is contrary to the plain language of the statute.

Having concluded that the county canvassing boards have the authority to order countywide manual recounts,

we must now determine whether the Commission[17] must accept a return after the seven-day deadline set forth in sections 102.111 and 102.112 under the circumstances presented.

V. THE APPLICABLE LAW

The abiding principle governing all election law in Florida is set forth in article I, section 1, Florida Constitution:

> SECTION 1. Political power.–All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I, § 1, Fla. Const. The constitution further provides that elections shall be regulated by law:

> SECTION 1. Regulation of elections.–All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. *Registration and elections shall, and political party functions may, be regulated by law*; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on

[17] The Commission is composed of the Secretary of State, the Director of the Division of Elections, and the Governor. *See* § 102.111, Fla. Stat. In this instance, Florida Governor Jeb Bush has removed himself from the Commission because his brother, Texas Governor George W. Bush, is the Republican candidate for President of the United States. Robert Crawford, Florida Commissioner on Agriculture, has been appointed to replace Florida Governor Jeb Bush. *See* § 102.111, Fla. Stat.

> the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Art. VI, § 1, Fla. Const. (emphasis added).

The Florida Election Code ("Code"), contained in chapters 97–106, Florida Statutes (2000), sets forth specific criteria regulating elections. The Florida Secretary of State is the chief election officer of the state and is charged with general oversight of the election system.[18] The Supervisor of Elections ("Supervisor") in each county is an elected official[19] and is charged with appointing two Election Boards for each precinct within the county prior to an election.[20] Each Election Board is composed of inspectors and clerks,[21] all of whom must be residents of the county,[22] and is charged with conducting the voting in the election, counting the votes,[23] and certifying the results to the Supervisor[24] by noon of the day following the election.[25] The County Canvassing Board ("Canvassing Board" or "Board"), which is composed of the Supervisor, a county court judge, and the chair of the board of county commissioners,[26] then canvasses the returns

[18] § 97.012, Fla. Stat. (2000).

[19] § 98.015, Fla. Stat. (2000).

[20] § 102.012(1), Fla. Stat. (2000).

[21] § 102.012(1), Fla. Stat. (2000).

[22] § 102.012(2), Fla. Stat. (2000).

[23] § 102.012(4), Fla. Stat. (2000).

[24] § 102.071, Fla. Stat. (2000).

[25] § 102.141(3), Fla. Stat. (2000).

[26] § 102.141(1), Fla. Stat. (2000).

countywide,[27] reviews the certificates,[28] and transmits the returns for state and federal officers to the Florida Department of State ("Department") by 5:00 p.m. of the seventh day following the election.[29] No deadline is set for filing corrected, amended, or supplemental returns.

The Elections Canvassing Commission ("Canvassing Commission" or "Commission"), which is composed of the Governor, the Secretary of State, and the Director of the Division of Elections, canvasses the returns statewide, determines and declares who has been elected for each office, and issues a certificate of election for each office as soon as the results are compiled.[30] If any returns appear to be irregular or false and the Commission is unable to determine the true vote for a particular office, the Commission certifies that fact and does not include those returns in its canvass.[31] In determining the true vote, the Commission has no authority to look beyond the county's returns.[32] A candidate or elector can "protest" the returns of an election as being erroneous by filing a protest with the appropriate County Canvassing Board.[33] And finally, a

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[27] § 102.141(2), Fla. Stat. (2000).

[28] § 102.141 (3), Fla. Stat. (2000).

[29] §§ 102.111–.112, Fla. Stat. (2000).

[30] §§ 102.111, .121, Fla. Stat. (2000).

[31] § 102.131, Fla. Stat. (2000) ("If any returns shall appear to be irregular or false so that the Elections Canvassing Commission is unable to determine the true vote for any office . . . the commission shall so certify and shall not include the returns in its determination, canvass, and declaration.").

[32] § 102.131, Fla. Stat. (2000) ("The Elections Canvassing Commission in determining the true vote shall not have authority to look beyond the county returns.").

candidate, elector, or taxpayer can "contest" the certification of election results by filing a post-certification action in circuit court within certain time limits[34] and setting forth specific grounds.[35]

VI. STATUTORY AMBIGUITY

The provisions of the Code are ambiguous in two significant areas. First, the time frame for conducting a manual recount under section 102.166(4) is in conflict with the time frame for submitting county returns under sections 102.111 and 102.112. Second, the mandatory language in section 102.111 conflicts with the permissive language in 102.112.

[Footnote continued from previous page]

[33] § 102.166, Fla. Stat. (2000).

[34] *See* § 102.168(2), Fla. Stat. (2000) (explaining that the action must be filed within ten days after the last Board certifies its returns or within five days after the last Board certifies its returns following a protest).

[35] The grounds for contesting an election are set forth in section 102.168(3), Florida Statutes (2000):

> (a) Misconduct, fraud, or corruption . . . sufficient to change or place in doubt the result of the election.
>
> (b) Ineligibility of the successful candidate . . . .
>
> (c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.
>
> (d) Proof that any elector, election official or canvassing board member was given or offered a bribe . . . .
>
> (e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question.

A. The Recount Conflict

Section 102.166(1) states that "any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn written protest." The time period for filing a protest is "prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever is later.

Section 102.166(4)(a), the operative subsection in this case, further provides that, in addition to any protest, "any candidate whose name appeared on the ballot . . . or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount" accompanied by the "reason that the manual recount is being requested." Section 102.166(4)(b) further provides that the written request may be made prior to the time the Board certifies the returns or within seventy-two hours after the election, whichever occurs later:[36]

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[36] As discussed in *Siegel v. Lepore*, 2000 WL 1687185 *6 (S.D. Fla. 2000):

> On its face, the manual recount provision does not limit candidates access to the ballot or interfere with voters' right to associate or vote. Instead the manual recount provision is intended to safeguard the integrity and reliability of the electoral process by providing a structural means of detecting and correcting clerical or electronic tabulating errors in the counting of election ballots. While discretionary in its application, the provision is not wholly standardless. Rather, the central purpose of the scheme, as

[Footnote continued on next page]

> (4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.
>
> *(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.*

§ 102.166, Fla. Stat. (2000) (emphasis added).

A Board "may" authorize a manual recount[37] and such a recount must include at least three precincts and

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> evidenced by its plain language, is to remedy 'an error in the vote tabulation which could affect the outcome of the election.' Fla. Stat. §102.166(5). In this pursuit, the provision strives to strengthen rather than dilute the right to vote by securing, as nearly as humanly possible, an accurate and true reflection of the will of the electorate. Notably, the four county canvassing boards [that were] challenged in this suit have reported various anomalies in the initial automated count and recount. The state manual recount provision therefore serves important governmental interests.

[37] The statute does not set forth any criteria for determining when a manual recount is appropriate. *See* § 102.166(4)(c), Fla. Stat.

[Footnote continued on next page]

at least one percent of the total votes cast for the candidate."[38] The following procedure then applies:

> (5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.
>
> (6) Any manual recount shall be open to the public.
>
> (7) Procedures for a manual recount are as follows:
>
> (a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.
>
> (b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

[Footnote continued from previous page]

(2000) ("The county canvassing board may authorize a manual recount.").

[38] § 102.166(4)(d), Fla. Stat. (2000).

§ 102.166, Fla. Stat. (2000).

Under this scheme, a candidate can request a manual recount at any point prior to certification by the Board and such action can lead to a full recount of all the votes in the county. Although the Code sets no specific deadline by which a manual recount must be completed, logic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days. The protest provision thus conflicts with section 102.111 and 102.112, which state that the Boards "must" submit their returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election or face penalties. For instance, if a party files a pre-certification protest on the sixth day following the election and requests a manual recount and the initial manual recount indicates that a full countywide recount is necessary, the recount procedure in most cases could not be completed by the deadline in sections 102.111 and 102.112, i.e., by 5:00 p.m. of the seventh day following the election.

B. The "Shall" and "May" Conflict

In addition to the conflict in the above statutes, sections 102.111 and 102.112 contain a dichotomy. Section 102.111, which sets forth general criteria governing the State Canvassing Commission, was enacted in 1951 as part of the Code and provides as follows:

> 102.111 Elections Canvassing Commission.–
>
> (1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of

> Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. *If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored*, and the results shown by the returns on file shall be certified.

§ 102.111, Fla. Stat. (2000) (emphasis added).

The Legislature in 1989 revised chapter 102 to include section 102.112, which provides that returns not received after a certain date "may" be ignored and that members of the County Board "shall" be fined:

> 102.112 Deadline for submission of county returns to the Department of State; penalties.–
>
> (1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. *If the returns are not received by the department by the time specified, such returns may be ignored* and the results on file at that time may be certified by the department.

> (2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds. Such fines shall be deposited into the Election Campaign Financing Trust fund, created by s. 106.32.
>
> (3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

§ 102.112, Fla. Stat. (2000) (emphasis added).

The above statutes conflict. Whereas section 102.111 is mandatory, section 102.112 is permissive. While it is clear that the Boards must submit returns by 5 p.m. of the seventh day following the election or face penalties, the circumstances under which penalties may be assessed are unclear.

VII. LEGISLATIVE INTENT

Legislative intent–as always–is the polestar that guides a court's inquiry into the provisions of the Florida Election Code.[39] Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code.[40] As noted above, however, chapter 102 is unclear concerning both the time limits

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[39] *See, e.g., Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

[40] *See, e.g., Starr Tyme, Inc. v. Cohen*, 659 So. 2d 1064 (Fla. 1995).

for submitting the results of a manual recount and the penalties that may be assessed by the Secretary. In light of this ambiguity, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent.[41]

First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general statute.[42] In the present case, whereas section 102.111 in its title and text addresses the general makeup and duties of the Elections Canvassing Commission, the statute only tangentially addresses the penalty for returns filed after the statutory date, noting that such returns "shall" be ignored by the Department. Section 102.112, on the other hand, directly addresses in its title and text both the "deadline" for submitting returns and the "penalties" for submitting returns after a certain date; the statute expressly states that such returns "may" be ignored and that dilatory Board members "shall" be fined. Based on the precision of the title and text, section 102.112 constitutes a specific penalty statute that defines both the deadline for filing returns and the penalties for filing returns thereafter and section 102.111 constitutes a non-specific statute in this regard. The specific statute controls the non-specific statute.

Second, it also is well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute.[43] In the present case, the provision in section 102.111 stating that the Department "shall" ignore returns was enacted in 1951 as part of the Code.

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[41] *See, e.g., Capers v. State*, 678 So. 2d 330 (Fla. 1996).

[42] *See, e.g.*, State ex rel.Johnson v. Vizzini, 227 So. 2d 205 (Fla. 1969).

[43] *See, e.g., McKendry v. State*, 641 So. 2d 45 (Fla. 1994).

On the other hand, the penalty provision in section 102.112 stating that the Department "may" ignore returns was enacted in 1989 as a revision to chapter 102. The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.

Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision.[44] In the present case, section 102.112 contains a detailed provision authorizing the assessment of fines against members of a dilatory County Canvassing Board. The fines are personal and substantial, i.e., $200 for each day the returns are not received. If, as the Secretary asserts, the Department were required to ignore all returns received after the statutory date, the fine provision would be meaningless. For example, if a Board simply completed its count late and if the returns were going to be ignored in any event, what would be the point in submitting the returns? The Board would simply file no returns and avoid the fines. But, on the other hand, if the returns submitted after the statutory date would not be ignored, the Board would have good reason to submit the returns and accept the fines. The fines thus serve as an alternative penalty and are applicable only if the Department may count the returns.

Fourth, related statutory provisions must be read as a cohesive whole.[45] As stated in *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992), "all parts of a statute must be read together in order to achieve a consistent whole. Where possible,

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[44] *See, e.g., Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995).

[45] *See, e.g., Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961).

courts must give effect to all statutory provisions and construe related statutory provisions in harmony with another." In this regard we consider the provisions of section 102.166 and 102.168.

Section 102.166 states that a candidate, political committee, or political party may request a manual recount any time before the County Canvassing Board certifies the results to the Department and, if the initial manual recount indicates a significant error, the Board "shall" conduct a countywide manual recount in certain cases. Thus, if a protest is filed on the sixth day following an election and a full manual recount is required, the Board, through no fault of its own, will be unable to submit its returns to the Department by 5:00 p.m. on the seventh day following the election. In such a case, if the mandatory provision in section 102.111 were given effect, the votes of the county would be ignored for the simple reason that the Board was following the dictates of a different section of the Code. The Legislature could not have intended to penalize County Canvassing Boards for following the dictates of the Code.

And finally, when the Legislature enacted the Code in 1951, it envisioned that all votes cast during a particular election, including absentee ballots, would be submitted to the Department at one time and would be treated in a uniform fashion. Section 97.012(1) states that it is the Secretary's responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Chapter 101 provides that all votes, including absentee ballots, must be received by the Supervisor no later than 7 p.m. on the day of the election. Section 101.68(2)(d) expressly states that "[t]he votes on absentee ballots shall be included in the total vote of the county." Chapter 102 requires that the Board submit the returns by 5 p.m. on the seventh day following the election.

The Legislature thus envisioned that when returns are submitted to the Department, the returns "shall" embrace all the votes in the county, including absentee ballots. This, of course, is not possible because our state statutory scheme has been superseded by federal law governing overseas voters;[46] overseas ballots must be counted if received no later than ten days following the election (i.e., the ballots do *not* have to be received by 7 p.m. of the day of the election, as provided by state law).[47] In light of the fact that overseas ballots cannot be counted until after the seven day deadline has expired, the mandatory language in section 102.111 has been supplanted by the permissive language of section 102.112.

Further, although county returns must be received by 5 p.m. on the seventh day following an election, the "official results" that are to be compiled in order to certify the returns and declare who has been elected must be construed in pari materia with section

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[46] According to the Secretary, this matter is governed by consent decree with the federal government.

[47] *See* Fla. Admin. Code R.1S-2.013 (1998), which provides in relevant part:

> (7) With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election shall be counted if received no later than 10 days from the date of the Federal election so long as such absentee ballot is otherwise proper. Overseas electors shall be informed by the supervisors of elections of the provisions of this rule, i.e., the ten day extension provision for the presidential preference primary and the general election, and the provision for voting for the second primary.

101.5614(8), which specifies that "write-in, absentee *and manually counted results* shall constitute the official return of the election." (Emphasis added.)

Under this statutory scheme, the County Canvassing Boards are required to submit their returns to the Department by 5 p.m. of the seventh day following the election. The statutes make no provision for exceptions following a manual recount. If a Board fails to meet the deadline, the Secretary is not required to ignore the county's returns but rather is permitted to ignore the returns within the parameters of this statutory scheme. To determine the circumstances under which the Secretary may lawfully ignore returns filed pursuant to the provisions of section 102.166 for a manual recount , it is necessary to examine the interplay between our statutory and constitutional law at both the state and federal levels.

VIII. THE RIGHT TO VOTE

The text of our Florida Constitution begins with a Declaration of Rights, a series of rights so basic that the founders accorded them a place of special privilege.[48] The Court long ago noted the venerable role the Declaration plays in our tripartite system of government in Florida:

> It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do. These Declarations of Rights . . . have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and

[48] *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992).

> supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade these vital rights of personal liberty and private property, "Thus far shalt thou come, but no farther."

State v. City of Stuart, 120 So. 335, 347 (Fla. 1929). Courts must attend with special vigilance whenever the Declaration of Rights is in issue.

The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished. The importance of this right was acknowledged by the authors of the Constitution, who placed it first in the Declaration. The very first words in the body of the constitution are as follows:

> SECTION 1. Political power.–*All political power is inherent in the people.* The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

Art. I., § 1, Fla. Const. (emphasis added). The framers thus began the constitution with a declaration that all political power inheres in the people and only they, the people, may decide how and when that power may be given up.[49]

[49] *See* Talbot D'Alemberte, *Commentary*, 25A Fla. Stat. Ann., Art. I, § 1, Fla. Const. (West 1991).

To the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no "unreasonable or unnecessary" restraints on the right of suffrage:

> The declaration of rights expressly states that "all political power is inherent in the people." Article I, Section 1, Florida Constitution. The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable [restraints on that right]. . . . *Unreasonable or unnecessary* restraints on the elective process are prohibited.

Treiman v. Malmquist, 342 So. 2d 972, 975 (Fla. 1977) (emphasis added).[50] Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote:

> Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots . . . . It is the intention of the law to obtain an honest expression of the will or desire of the voter.

[50] *See also Pasco v. Heggen*, 314 So. 2d 1, 3 (Fla. 1975) ("We have also stated that only unreasonable or unnecessary restraints on the elective process are prohibited.").

State ex rel. Carpenter v. Barber, 198 So. 49, 51 (Fla. 1940).[51] Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy.[52] Technical statutory requirements must not be exalted over the substance of this right.[53]

Based on the foregoing, we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances as we set forth in this opinion. The clear import of the penalty provision of section 102.112 is to deter Boards from engaging in dilatory conduct contrary to statutory authority that results in the late certification of a county's returns. This deterrent purpose is achieved by the fines in section 102.112, which are substantial and personal and are levied on each member of a Board. The alternative penalty, i.e., ignoring the county's returns, punishes not the Board members themselves but

[51] *See also State ex rel. Whitley v. Rinehart*, 192 So. 819, 823 (Fla. 1939) ("Election laws should be construed liberally in favor of the right to vote . . . .").

[52] *See, e.g., State ex rel. Landis v. Dyer*, 148 So. 201, 203 (Fla. 1933) ("The right to vote, though not inherent, is a constitutional right in this state. The Legislature may impose reasonable rules and regulations for its governance, but it cannot under the guise of such regulation unduly subvest or restrain this right.").

[53] *See, e.g., Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975) ("In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected.").

rather the county's electors. for it in effect disenfranchises them.[54]

Ignoring the county's returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process."[55] In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by the law. To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding law.

Allowing the manual recounts to proceed in an expeditious manner, rather than imposing an arbitrary seven-day deadline, is consistent not only with the statutory scheme but with prior United States Supreme Court pronouncements:

> Indiana has found, along with many other States, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. Despite the fact that a certificate of election may be issued to the leading candidate within 30 days

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[54] *Cf. Boardman v. Esteva*, 323 So. 2d 259, 268-69 (Fla. 1975) ("When the voters have done all that the statute has required them to do, they will not be disfranchised solely on the basis of the failure of the election officials to observe directory statutory instructions.").

[55] *See* 3 U.S.C. §§ 1-10 (1994).

> after the election, the results are not final if a candidate's option to compel a recount is exercised. A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, s 4.

Roudebush v. Hartke, 405 U.S. 15, 25 (1972)(footnotes omitted).

In addition, an accurate vote count is one of the essential foundations of our democracy. The words of the Supreme Court of Illinois are particularly apt in this case:

> The purpose of our election laws is to obtain a correct expression of the intent of the voters. Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law. . . . The legislature authorized the use of electronic tabulating equipment to expedite the tabulating process and to eliminate the possibility of human error in the counting process, not to create a technical obstruction which defeats the rights of qualified voters. This court should not, under the appearance of enforcing the election laws, defeat the very object which those law are intended to achieve. To invalidate a ballot which clearly reflects the voter's intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end.
>
> The voters here did everything which the Election Code requires when they punched the appropriate chad with the stylus. These voters

> should not be disfranchised where their intent may be ascertained with reasonable certainty, simply because the chad they punched did not completely dislodge from the ballot. Such a failure may be attributable to the fault of the election authorities, for failing to provide properly perforated paper, or it may be the result of the voter's disability or inadvertence. Whatever the reason, where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect.

Pullen v. Milligan, 561 N.E.2d 585, 611 (Ill. 1990) (citations omitted).

IX. THE PRESENT CASE

The trial court below properly concluded that the County Canvassing Boards are required to submit their returns to the Department by 5:00 p.m. of the seventh day following the election and that the Department is not required to ignore the amended returns but rather may count them. The court, however, erred in holding that the Secretary acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts. The Secretary's rationale for rejecting the Board's returns was as follows:

> The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other

> extenuating circumstances that are beyond its control. The Board has alleged the *possibility* that the results of the manual recount *could* affect the outcome of the election if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the *possibility* of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

Letter from Katherine Harris to Palm Beach Canvassing Board (Nov. 15, 2000)(emphasis added).

We conclude that, consistent with the Florida election scheme, the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process. The Secretary in the present case has made no claim that either of these conditions apply at this point in time.

The above analysis is consistent with *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988), wherein the Court addressed a comparable recount issue. There, the total votes cast for each of two candidates for a seat in the United State House of Representatives were separated by less than one-half of one percent; the county conducted a mandatory recount; the Board's certification of results was not received by the Department until two days after the deadline, although the Board had telephoned the results to the Department prior to the deadline; and the unsuccessful candidate sued to prevent the Department from counting the late

votes. The Court concluded that the will of the electors supersedes any technical statutory requirements:

> [T]he electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election. "There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain the statute has not been literally and absolutely complied with?"

Chappell, 536 So. 2d at 1008-09 (quoting *Boardman v. Esteva*, 323 So. 2d 259, 267 (Fla. 1975)).

X. CONCLUSION

According to the legislative intent evinced in the Florida Election Code, the permissive language of section 102.112 supersedes the mandatory language of section 102.111. The statutory fines set forth in section 102.112 offer strong incentive to County Canvassing Boards to submit their returns in a timely fashion. However, when a Board certifies its returns after the seven-day period because the Board is acting in conformity with other provisions of the Code or with administrative rules or for other good cause, the Secretary may impose no fines. It is unlikely that the Legislature would have intended to punish a Board for complying with the dictates of the Code or some other law.

Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed after the

initial statutory date are limited. The Secretary may ignore such returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process. In either such case, this drastic penalty must be both reasonable and necessary. But to allow the Secretary to summarily disenfranchise innocent electors in an effort to punish dilatory Board members, as she proposes in the present case, misses the constitutional mark. The constitution eschews punishment by proxy.

As explained above, the Florida Election Code must be construed as a whole. Section 102.166 governs manual recounts and appears to conflict with sections 102.111 and 102.112, which set a seven day deadline by which County Boards must submit their returns. Further, section 102.111, which provides that the Secretary "shall" ignore late returns, conflicts with section 102.112, which provides that the Secretary "may" ignore late returns. In the present case, we have used traditional rules of statutory construction to resolve these ambiguities to the extent necessary to address the issues presented here. We decline to rule more expansively, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it -- the Legislature.

Because of the unique circumstances and extraordinary importance of the present case, wherein the Florida Attorney General and the Florida Secretary of State have issued conflicting advisory opinions concerning the propriety of conducting manual recounts, and because of our reluctance to rewrite the Florida Election Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy that

will allow a fair and expeditious resolution of the questions presented here.[56]

Accordingly, in order to allow maximum time for contests pursuant to section 102.168, amended certifications must be filed with the Elections Canvassing Commission by 5 p.m. on Sunday, November 26, 2000 and the Secretary of State and the Elections Canvassing Commission shall accept any such amended certifications received by 5 p.m. on Sunday, November 26, 2000, provided that the office of the Secretary of State, Division of Elections is open in order to allow receipt thereof. If the office is not open for this special purpose on Sunday, November 26, 2000, then any amended certifications shall be accepted until 9 a.m. on Monday, November 27, 2000. The stay order entered on November 17, 2000, by this Court shall remain in effect until the expiration of the time for accepting amended certifications set forth in this opinion. The certificates made and signed by the Elections Canvassing Commission pursuant to section 102.121 shall include the amended returns accepted through the dates set forth in this opinion.

It is so ordered. No motion for rehearing will be allowed.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

* * * * *

[56] At oral argument, we inquired as to whether the presidential candidates were interested in our consideration of a reopening of the opportunity to request recounts in any additional counties. Neither candidate requested such an opportunity.

APPENDIX B

SUPREME COURT OF FLORIDA

Friday, November 17, 2000 – CORRECTED ORDER

Case Nos.: SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, ETC., ET AL.
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, ET AL.,
Appellants,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

STAY ORDER

In order to maintain the status quo, the Court, on its own motion, enjoins the Respondent, Secretary of State and Respondent, the Elections Canvassing Commission

from certifying the results of the November 7, 2000, presidential election, until further order of this Court. It is NOT the intent of this Order to stop the counting and conveying to the Secretary of State the results of absentee ballots or any other ballots.

WELLS, C.J., SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

APPENDIX C

SUPREME COURT OF FLORIDA

Thursday, November 16, 2000

Case No.: SC00-2346

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, ETC., ET AL.
Respondents.

We enter the present interim order in this matter. We have considered the Petition and it appears that the relief sought on the question of whether the Canvassing Board may conduct a manual recount of the votes cast for President and Vice President has been answered in the affirmative by the Circuit Courts of Leon and Palm Beach County. At present, this is binding legal authority on this issue and there is no legal impediment to the recounts continuing. Thus, Petitioners are authorized to proceed with the manual recount.

WELLS, C.J., SHAW, HARDING, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

APPENDIX D

**IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

MICHAEL McDERMOTT, ANN McFALL and PATRICIA NORTHEY, as the CANVASSING BOARD FOR VOLUSIA COUNTY, FLORIDA, CANVASSING BOARD FOR PALM BEACH COUNTY, FLORIDA, DEMOCRATIC PARTY OF FLORIDA, and VICE PRESIDENT ALBERT GORE

Plaintiffs, CASE NO: 00-2700

vs.

HONORABLE KATHERINE HARRIS, as Secretary of State, State of Florida, and HONORABLE KATHERINE HARRIS, HONORABLE BOB CRAWFORD and HONORABLE LAURENCE C. ROBERTS, as the Elections Canvassing Commission, GOVERNOR GEORGE W. BUSH, and MATT BUTLER,

Defendants.

_____/

ORDER DENYING EMERGENCY MOTION TO COMPEL COMPLIANCE WITH AND FOR ENFORCEMENT OF INJUNCTION

The limited issue before me on this Motion is whether the Secretary of State has violated my Order of November 14, 2000. The Plaintiffs assert that she has

acted arbitrarily in deciding to ignore amended returns from counties conducting manual recounts. I disagree.

As noted in my previous Order, Florida law grants to the Secretary, as the Chief Elections Officer, broad discretionary authority to accept or reject late filed returns. The purpose and intent of my Order was to insure that she in fact properly exercised her discretion, rather than automatically reject returns that came in after the statutory deadline.

On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My Order requires nothing more.

Accordingly, it is

ORDERED AND ADJUDGED that the Motion is hereby denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 17th day of November, 2000.

/s/
TERRY P. LEWIS, Circuit Judge

APPENDIX E

**IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

MICHAEL McDERMOTT, ANN McFALL and PATRICIA NORTHEY, as the CANVASSING BOARD FOR VOLUSIA COUNTY, FLORIDA, CANVASSING BOARD FOR PALM BEACH COUNTY, FLORIDA, DEMOCRATIC PARTY OF FLORIDA, and VICE PRESIDENT ALBERT GORE

Plaintiffs, CASE NO: 00-2700

vs.

HONORABLE KATHERINE HARRIS, as Secretary of State, State of Florida, and HONORABLE KATHERINE HARRIS, HONORABLE BOB CRAWFORD and HONORABLE LAURENCE C. ROBERTS, as the Elections Canvassing Commission, GOVERNOR GEORGE W. BUSH, and MATT BUTLER,

Defendants.

_____/

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR TEMPORARY INJUNCTION

This declaratory judgment action is before me on the Motion of the Canvassing Board for Volusia County for a temporary injunction against the Secretary of State

and the Elections Canvassing Commission. By Motion and agreement of the parties, the Florida Democratic Party, Candidate Al Gore, and the Canvassing Board of Palm Beach County have intervened as Party Plaintiffs, and Candidate George W. Bush and Elector Matt Butler have intervened as Party Defendants.

The heart of the issue raised by the Motion is this: Section 102.166, *Florida Statutes*, contemplates that upon request a county canvassing board may authorize a manual recount of votes cast in an election. Both Volusia and Palm Beach Counties have so authorized, and are in the process of conducting, a manual recount. The Boards are concerned that the manual recounts may not be completed by 5:00 p.m. today, November 14, 2000, which is the deadline imposed upon them by Section 102.112, *Florida Statutes*, to certify and report the election returns to the Secretary of State. This Section provides that if the returns are not received by the deadline, such returns *may* be ignored by the Secretary in her certification of results statewide.

The Plaintiffs insist that the Secretary of State *must* consider the certified results from Volusia and Palm Beach Counties, even if they are filed late, if they are still engaged in the manual recount of the votes. The Secretary of State insists that, absent an Act of God such as a hurricane, any returns not received by the statutory deadline *will not* be counted in the statewide tabulations and certification of the election results. For the reasons set forth below, I find that the County Canvassing Boards must certify and file what election returns they have by the statutory deadline of 5:00 p.m. of November 14, 2000, with due notification to the Secretary of State of any pending manual recount, and may thereafter file supplemental or corrective returns. The Secretary of State may ignore such late filed returns, but may not do so arbitrarily, rather, only by the proper exercise of discretion after consideration of all appropriate facts and circumstances.

The Secretary of State takes the position that the law requires the County Canvassing Boards to certify and report the results of elections in their counties no later than 5:00 p.m. November 14, 2000, that there are no exceptions to this mandate, and that the Secretary is likewise required by law to ignore any untimely received returns unless the untimeliness is caused by a hurricane or other Act of God.[1] I give great deference to the interpretation by the Secretary of the election laws, and I agree that the Canvassing Boards must file their returns by 5:00 p.m. today. I disagree, however, that the Secretary is required to ignore any late filed returns absent an Act of God. There are several reasons for my conclusion:

1. A reading of the entire Election Code suggests a legislative intent to balance the desire for accuracy with the desire for finality. By concentrating on the deadline imposed by Section 102.112, *Florida Statutes*, the Secretary has come down hard on the side of finality. This interpretation ignores, however, Section 102.166, *Florida Statutes*, which gives to the County Canvassing Boards the authority to authorize a manual recount. A request for such recount may be made within three days of the election. If a manual recount of at least three precincts and at least one percent (1%) of the total votes indicates an error in vote tabulation which could effect the outcome of the election, the Canvassing Board shall either (a) correct the error and recount the remaining precincts with the vote tabulation system, (b) request the Department of State to verify the tabulation software, or (3) manually recount all ballots.

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[1] The Secretary of State acknowledges that Section 102.112, rather than Section 102.111, *Florida Statutes*, prevails as to the question of the whether the Department has any discretion in whether to ignore late filed results.

Depending on when a request is made and then acted upon, it is easy to imagine a situation where a manual recount could be lawfully authorized, commenced, but not completed within seven days of the election. The Secretary of State responds that the authority to authorize a manual recount is subject to the requirement that such recount be done and the results certified no later than the deadline imposed by Section 102.112, *Florida Statutes*. This would mean, however, that only in sparsely populated counties could a Canvassing Board safely exercise what the Legislature has clearly intended to be an option where the Board has a real question as to the accuracy of a vote.

2. Section 102.166, *Florida Statutes*, gives any candidate, or qualified elector, the right to protest the returns of a County Canvassing Board by filing a sworn written protest, and that protest may be filed within five (5) days of the election, or any time before the Canvassing Board certifies the results, *whichever occurs later*. This suggests that the Canvassing Board might be in a position of having to address a protest of its returns the day before, or hours before, it was to certify the results pursuant to the deadline in Section 102.112, *Florida Statutes*, thus making it impossible to correct any error before the deadline. It is unlikely that the Legislature would give the right to protest returns, but make it meaningless because it could not be acted upon in time.

3. Section 102.168 provides for the contesting of an election by an unsuccessful candidate or a qualified elector, by filing a complaint in Circuit Court within ten (10) days after the Canvassing Board certifies the result of an election or within five (5) days after the Canvassing Board certifies the results of an election following a protest pursuant to Section 102.166(1), *Florida Statutes, whichever occurs later*. This provision suggests that certifications of the results in an election

might occur later than usual if there is a protest of the returns.

4. The Secretary of State acknowledges that, by consent decree with the Federal Government, the absentee ballots of overseas electors must be counted if received up to ten (10) days after the election (three days beyond the deadline imposed by Section 102.112, *Florida Statutes*). The County Canvassing Board can not report final returns, nor can the Election Canvassing Commission determine a winner of the election until all of these overseas absentee ballots are counted. The Secretary explains this anomaly by inferring a requirement to do one certification of results seven (7) days after the election and a "supplemental certification" ten (10) days after the election. There is, however, no statutory provision that provides for such a supplemental certification. Instead, Section 102.111, *Florida Statutes*, which deals specifically with the duty of the Elections Canvassing Commission, requires the Commission to, "as soon as the official results are compiled from all Counties, certify the returns of the election and *determine and declare who has been selected for each office*. . . ."

5. As noted earlier, the Secretary acknowledges that Section 102.112, *Florida Statutes*, uses the discretionary term "may", instead of the mandatory term "shall" as to whether late returns are to be ignored by the Secretary in certifying the results of the election. That the Secretary *may* ignore late filed returns necessarily means that the Secretary *does not have to* ignore such returns. It is, as the Secretary acknowledges, within her discretion.

To determine ahead of time that such returns *will* be ignored, however, unless caused by some Act of God, is not the exercise of discretion. It is the abdication of that discretion. An Act of God has long been considered to excuse even the most mandatory of requirements. Rather, the exercise of discretion, by its nature,

contemplates a decision based upon a weighing and consideration of all attendant facts and circumstances.

The Florida Supreme Court has stated that "substantial compliance" is sufficient to comply with such mandatory filing deadlines. See *Chappel v. Martinez*, 536 So. 2d 1007 (Fla. 1988). If the returns are received from a County at 5:05 p.m. on November 14, 2000, should the results be ignored? What about fifteen minutes? An hour? What if there was an electrical power outage? Some other malfunction of the transmitting equipment? More particularly related to this case, when was the request for recount made? What were the reasons given? When did the Canvassing Board decide to do a manual recount? What was the basis for determination that such a recount was the appropriate action? How late were the results?

Obviously, the list of scenarios is almost endless and the questions that would need to be asked in properly exercising discretion as to whether to ignore or not ignore late filed returns are numerous. The Secretary may, and should, consider all of the facts and circumstances.

The County Canvassing Boards are, indeed, mandated to certify and file their returns with the Secretary of State by 5:00 p.m. today, November 14, 2000. There is nothing, however, to prevent the County Canvassing Boards from filing with the Secretary of State further returns after completing a manual recount. It is then up to the Secretary of State, as the Chief Election Officer, to determine whether any such corrective or supplemental returns filed after 5:00 p.m. today, are to be ignored. Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done, the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether to

include or to ignore the late filed returns in certifying the election results and declaring the winner.

Just as the Secretary cannot decide ahead of time what late returns should or should not be ignored, it would not be proper for me to do so by injunction. I can lawfully direct the Secretary to properly exercise her discretion in making a decision on the returns, but I cannot enjoin the Secretary to make a particular decision, nor can I rewrite the Statute which, by its plain meaning, mandates the filing of returns by the Canvassing Boards by 5:00 p.m. on November 14, 2000.

I also note that although the Canvassing Boards cannot properly contest an election, an unsuccessful Candidate, or any qualified Elector, may file, pursuant to Section 102.168, *Florida Statutes*, a complaint in Circuit Court contesting the election results. One of the specific itemized grounds for such a challenge is the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election."

Accordingly, it is

ORDERED AND ADJUDGED that the Secretary of State is directed to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion. In all other respects, the Motion for Temporary Injunction is denied.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 14th day of November, 2000.

/s/
TERRY P. LEWIS, Circuit Judge

APPENDIX F

FLORIDA STATUTES

TITLE 9—ELECTORS AND ELECTIONS

CHAPTER 102—CONDUCTING ELECTIONS AND ASCERTAINING THE RESULTS

* * * * *

102.111 Elections Canvassing Commission.

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

(2) The Division of Elections shall provide the staff services required by the Elections Canvassing Commission.

102.112 Deadline for submission of county returns to the Department of State; penalties.

(1) The county canvassing board or a majority thereof shall file the county returns for the election of a

federal or state officer with the Department of State immediately after certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.

(2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds. Such fines shall be deposited into the[1] Election Campaign Financing Trust Fund, created by § 106.32.

(3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

* * * * *

102.141 County canvassing board; duties.

* * * * *

(4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-half of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-half of a percent or less of the votes cast on such measure, the board responsible for certifying the results

[1] The trust fund expired, effective November 4, 1996, by operation of § 19(f), Art. III of the State Constitution.

of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure. A recount need not be ordered with respect to the returns for any office, however, if the candidate or candidates defeated or eliminated from contention for such office by one-half of a percent or less of the votes cast for such office request in writing that a recount not be made. Each canvassing board responsible for conducting a recount shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

* * * * *

102.166 Protest of election returns; procedure.

(1) Any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest.

(2) Such protest shall be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later.

(3) Before canvassing the returns of the election, the canvassing board shall:

(a) When paper ballots are used, examine the tabulation of the paper ballots cast.

(b) When voting machines are used, examine the counters on the machines of nonprinter machines or the printer-pac on printer machines. If there is a discrepancy between the returns and the counters of the machines or the printer-pac, the counters of such machines or the printer-pac shall be presumed correct.

(c) When electronic or electromechanical equipment is used, the canvassing board shall examine precinct records and election returns. If there is a clerical error, such error shall be corrected by the county canvassing board. If there is a discrepancy which could affect the outcome of an election, the canvassing board may recount the ballots on the automatic tabulating equipment.

(4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.

(c) The county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make a reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount.

(d) The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than

three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

(5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

(6) Any manual recount shall be open to the public.

(7) Procedures for a manual recount are as follows:

(a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.

(b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

(8) If the county canvassing board determines the need to verify the tabulation software, the county canvassing board shall request in writing that the Department of State verify the software.

(9) When the Department of State verifies such software, the department shall:

(a) Compare the software used to tabulate the votes with the software filed with the Department of State pursuant to § 101.5607; and

(b) Check the election parameters.

(10) The Department of State shall respond to the county canvassing board within 3 working days.

• • • • •

102.168 Contest of election.

(1) Except as provided in § 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

(2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to § 102.166(1), whichever occurs later.

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been

served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

* * * * *

FLORIDA STATUTES
TITLE 9—ELECTORS AND ELECTIONS
CHAPTER 106—CAMPAIGN FINANCING

* * * * *

106.23 Powers of the Division of Elections.

(1) In order to carry out the responsibilities prescribed by § 106.22, the Division of Elections is empowered to subpoena and bring before its duly authorized representatives any person in the state, or any person doing business in the state, or any person who

has filed or is required to have filed any application, document, papers, or other information with an office or agency of this state or a political subdivision thereof and to require the production of any papers, books, or other records relevant to any investigation, including the records and accounts of any bank or trust company doing business in this state. Duly authorized representatives of the division are empowered to administer all oaths and affirmations in the manner prescribed by law to witnesses who shall appear before them concerning any relevant matter. Should any witness fail to respond to the lawful subpoena of the division or, having responded, fail to answer all lawful inquiries or to turn over evidence that has been subpoenaed, the division may file a complaint before any circuit court of the state setting up such failure on the part of the witness. On the filing of such complaint, the court shall take jurisdiction of the witness and the subject matter of said complaint and shall direct the witness to respond to all lawful questions and to produce all documentary evidence in the witness's possession which is lawfully demanded. The failure of any witness to comply with such order of the court shall constitute a direct and criminal contempt of court, and the court shall punish said witness accordingly. However, the refusal by a witness to answer inquiries or turn over evidence on the basis that such testimony or material will tend to incriminate such witness shall not be deemed refusal to comply with the provisions of this chapter.

(2) The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or

proposes to take. A written record of all such opinions issued by the division, sequentially numbered, dated, and indexed by subject matter, shall be retained. A copy shall be sent to said person or organization upon request. Any such person or organization, acting in good faith upon such an advisory opinion, shall not be subject to any criminal penalty provided for in this chapter. The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion.

APPENDIX G
SUPREME COURT OF FLORIDA

Nos. SC00-2346, SC00-2348 & SC00-2349

PALM BEACH COUNTY CANVASSING BOARD,
Petitioner,
vs.
KATHERINE HARRIS, ETC., ET AL.
Respondents.

VOLUSIA COUNTY CANVASSING BOARD, ET AL.,
Appellants,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

FLORIDA DEMOCRATIC PARTY,
Appellant,
vs.
KATHERINE HARRIS, ETC., ET AL.
Appellees.

FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF INTERVENOR / RESPONDENT GEORGE W. BUSH

* * * * *

[Page 42]

In the present context, *federal* law also places additional constraints on courts that require them strictly to adhere to the legislature's prescribed manner for conducting an election to choose the State's presidential electors. Under 3 U.S.C. §5, a State is required to select its electors "by laws enacted *prior* to" election day. *See* 3 U.S.C. §5 (emphasis added). The purpose of the statute is to ensure that neither the Legislature, nor the Executive, nor the courts can change the applicable

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rules once the voters have gone to the polls. Florida law on November 7, 2000, unambiguously required county canvassing boards to count, and recount if necessary, and manually recount if they chose, within the time prescribed by law. Under Section 102.112 the Secretary of State was given discretion sometimes not to ignore late results. But no provision of state law in effect prior to the election, however, granted *courts* equitable power to disregard both the deadline and the Secretary's exercise of reasoned discretion.[15] It would

[15] Indeed, by operation of the Supremacy Clause, Article VI, U.S. Constitution, federal law incorporates by reference whatever processes a state establishes by law for choosing electors. The United States Constitution provides that the *legislatures* of the States will prescribe the manner in which presidential electors are chosen, Article II, Section 1 U.S. Constitution and Congress has provided in federal law that "[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next

[Footnote continued on next page]

also violate the United States Constitution for the Secretary of State to permit the 3 counties to complete its manual recount and certify those results. The selective manual recounts authorize

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county boards to engage in arbitrary and unequal counting of votes, and result in the disparate treatment of Florida voters based solely on where within the state they happen to reside.

This scheme, as applied, violates the United States Constitution in three respects. First, it dilutes the votes of Florida voters, both within and without the counties that are manually counted, by counting their votes differently based upon where they reside, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See, e.g., O'Brien v. Skinner*, 414 U.S. 524 (1974). Second, because the manual

[Footnote continued from previous page]

after the first Monday in November" in an election year. 3 U.S.C. § 1. Congress has further provided that if a State "has failed to make a choice on the day prescribed by law," it falls to the legislature of the State to determine how the electors will be appointed. 3 U.S.C. § 2. In the present case, the day prescribed by law was Tuesday, November 7, and the State of Florida held an election on that day *subject to the procedures, including reporting procedures and deadlines, established by state law*. It follows, therefore under the relevant federal statutes and the Supremacy Clause that all actors at the state level - including judges -- are bound to respect the choices made by the Florida legislature as to the process of selecting the state's presidential electors. It would therefore violate federal law for the state *courts* to use equitable doctrines to supplement the *legislature's* judgment, reflected in the statutes of the state, regarding the methods and time limits for selecting presidential electors.

recount statute prescribes no meaningful standards for officials conducting such recounts, it permits the invasion of the liberty interest in voting in an arbitrary and capricious manner. *See, e.g., Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir. 1995). Finally, because the right to vote directly implicates the right of association under the First Amendment, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), it falls squarely within the principle that state actors cannot exercise unconstrained discretion over the implementation of laws that touch upon First Amendment rights. *See City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750, 763 (1988). For these reasons, allowing the manual recounts to proceed would violate the United States Constitution.

Supreme Court, U.S.
FILED
NOV 23 2000
CLERK

Nos. 00-836 and 00-837

IN THE

Supreme Court of the United States

George W. Bush,

Petitioner,

v.

Palm Beach County Canvassing Board, *et al.*,

Respondent.

Ned L. Siegel, *et al.*,

Petitioner,

v.

Theresa LePore, *et al.*,

Respondent.

On Petitions for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eleventh Circuit and for a Writ of Certiorari to the Supreme Court of Florida

BRIEF IN OPPOSITION OF RESPONDENTS AL GORE, JR., AND FLORIDA DEMOCRATIC PARTY

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November 23, 2000

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's interpretation of Florida law presents a substantial federal question for this Court to review or instead a determination reserved to the States?

2. Whether the State of Florida's statutorily mandated manual recount process, indistinguishable from the laws of other states and reflective of a process that has been applied throughout this country for centuries, violates the U.S. Constitution?

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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

In two companion petitions for writs of certiorari, Governor George W. Bush, together with related parties, asks this Court to interfere with ongoing manual recounts of the ballots cast in the State of Florida for the President of the United States as provided under Florida law. One petition, which seeks review of the judgment of the Florida Supreme Court interpreting provisions of the Florida Election Code governing manual recounts, rests on intemperate and insupportable mischaracterizations of that court's decision as usurping the role of the state legislature. In fact, the Florida Supreme Court played a familiar and quintessentially *judicial* role: it interpreted Florida law "us[ing] traditional rules of statutory construction to resolve [statutory] ambiguities." Slip op. at 39. Indeed, the court expressly "decline[d] to rule more expansively, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it – the Legislature." *Id.* Thus, the questions purportedly framed in the petition are not in fact presented by this case.

The other petition seeks certiorari before judgment in a case in which the U.S. District Court for the Southern District of Florida has merely denied a preliminary motion to restrain the recounts and the U.S. Court of Appeals for the Eleventh Circuit has denied an injunction pending appeal and has nearly completed expedited briefing. That petition necessarily would bring only an extremely narrow question for the Court's consideration. In addition, that petition is riddled with non-record, *ex parte*, partisan accusations regarding the manner in which the Florida recount is proceeding. These accusations are false and have not been tested in court through cross-examination, verification, or judicial fact-finding. Indeed, Petitioners have deliberately avoided proceeding in the appropriate fora where their factual claims could be considered and resolved. All of this underscores the undeveloped nature of this case, the absence of adequate foundation in the courts

below, and the inappropriateness of the extraordinary step of certiorari before judgment.

Moreover, the substance of Petitioners' federal claims does not warrant review by this Court. Petitioners ask this Article III Court to interfere with a task that has been expressly delegated to the State of Florida by the U.S. Constitution's command in Article II that "[e]ach *State* shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2 (emphasis added). This is not merely a question of a power "reserved" to the States by the Constitution, cf. U.S. Const. amend. X, but of an express constitutional delegation of exclusive authority. The Constitution explicitly confers upon the States plenary and exclusive power to establish the manner in which their presidential electors are chosen. *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968); *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892); *Ray* v. *Blair*, 343 U.S. 214, 224-25 (1952). At bottom, Petitioners seek to have this Court intervene in the process by which the organs of the Florida state government are effecting the procedure by which the State legislature has determined to appoint that State's presidential electors.

Beyond the obvious reasons that certiorari should be denied in this case – the patent insubstantiality of the federal claims presented, the absence of any conflict in authority, the utterly factbound and undeveloped nature of Petitioners' arguments – there are profound reasons of institutional legitimacy that counsel against a grant of certiorari. To begin with, principles of federalism that this Court has repeatedly reaffirmed against vigorous challenge counsel strongly against interference by this, or any, federal court in the process articulated by Florida state law, as set out by statute and interpreted by the courts of that State. Only on the most compelling showing of a constitutional violation should a federal court interfere with this task, uniquely delegated by the Constitution to the State government.

Petitioners' federal claims, even if properly presented,[1] are insubstantial and do not come close to meeting the high threshold that would require this Court to interfere with a State's process for appointing its electors for President of the United States.

Finally, this Court's involvement here will not add "legitimacy" to the outcome of the election. *Contra* Pet. for Certiorari, *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836 (Nov. 22, 2000) [hereinafter *Bush* Pet.] at 12. The cases below involve only questions of Florida state law, questions that even Petitioners ultimately agree are within the power of the Supreme Court of Florida to resolve. *Id.* at 10 ("Given the national significance of the Florida election results, it is essential that the counting of ballots be conducted in a fair and consistent manner in accordance with established Florida law."). This Court's interference with the normal processes by which questions of state law are resolved, and indeed, with the ongoing processes by which the President and Vice-President of the United States are chosen, would only diminish the legitimacy of the outcome of the election. That is particularly true given that it is difficult to imagine how this Court could intervene in the still-ongoing state proceedings so rapidly and clearly as not to deflect and derail the election process in untoward and unprecedented directions.

Thus, even if it were true that the outcome of the case may raise for the public "questions of similar magnitude" to those presented in cases such as *United States* v. *Nixon*, 418 U.S. 683 (1974), see Pet. for Certiorari, *Siegel* v. *LePore*, No. 00-837 (Nov. 22, 2000) [hereinafter *Siegel* Pet.] at 15, it presents no federal constitutional *questions* of similar magnitude – indeed,

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[1] There is the greatest doubt that Petitioners' federal claims in the state court action are fairly presented here, given that Petitioners consciously decided to avoid discussing federal law in the Florida trial court and raised the question before the state Supreme Court only in a few pages at the end of a brief there. See Slip op. at 10 n.10.

no constitutional questions of any real substance at all. Thus, the petitions for certiorari in both *Bush* v. *Palm Beach County Canvassing Board* and *Siegel* v. *LePore* should be denied.

STATEMENT OF THE CASE

A. The Election

On November 7, 2000, Florida citizens cast over 5,820,000 ballots in the general election for the President of the United States. Under Florida's election law, the outcome of this election would determine what slate of electors would cast Florida's twenty-five electoral votes for the President of the United States.

Based on initial returns transmitted to it by the county canvassing boards of Florida's sixty-seven counties, on Wednesday, November 8, 2000, the Florida Division of Elections ("Division") reported that Governor George W. Bush had received 2,909,135 votes for President and that Vice-President Al Gore had received 2,907,351 votes.

B. Florida's Recount Provisions

Because the margin between the two leading candidates was less than one-half of one percent of the total votes cast for that office, Florida law required an automatic recount of the ballots. Fla. Stat. § 102.141(4). No specific process is required under Florida law for this recount. Most counties conducted this recount by simply repeating whatever process, usually machine, they had used to count the ballots initially. A few counties, however, conducted hand recounts. At the end of this initial automatic recount, the margin between the two leading candidates for President of the United States was reduced from the initially stated 1,784 votes to 300 votes.

Florida law provides that its counties may conduct a further manual recount to address "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). In any county, any candidate "may file a written request with the county canvassing board for a manual recount."

Id. § 102.166(4)(a). The statute requires that the request "contain a statement of the reason the manual recount is being requested." *Id.* Any such request "must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later." Fla. Stat. § 102.166(4)(b).

The purpose of the manual recount is to determine whether there is "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). If a county canvassing board decides to grant a request for a manual recount, it need not initially order a county-wide recount. Rather, an initial recount only "must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue * * * . The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts. *Id.* § 102.166(4)(d). The statute further provides that:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board *shall*:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

Fla. Stat. § 102.166(5) (emphasis added).

Manual recounts must be conducted in accordance with the procedures set forth in Section 102.166(7). Those procedures require that the county canvassing board appoint counting teams of at least two electors who are members of different political parties to manually recount the ballots. If a counting team is unable to determine a voter's intent in casting a ballot, the ballot

must be "presented to the county canvassing board for it to determine the voter's intent." Fla. Stat. § 102.166(7)(a)-(b).

C. The Manual Recounts, Petitioners' Attempted Federal Action, and the Scope of the *Siegel* Petition

After the automatic statewide recount reduced the margin between Governor Bush and Vice-President Gore to 300 votes, the Florida Democratic Party requested a manual recount in four Florida counties: Palm Beach, Volusia, Broward, and Miami-Dade. Pursuant to those requests and the requirements of Florida Statutes Section 102.166(4)(d), the county canvassing boards of those counties conducted a sample manual recount of 1 percent of the total votes cast in their respective counties.[2]

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[2] Both Palm Beach County and Broward County employ a punch card balloting system. Voters in the counties are given a rectangular card ballot covered with perforated squares. Although the squares are numbered, the candidates' names do not appear on the ballot. Voters are instructed to slide the card into a machine, which holds a book listing the candidates for office next to a series of holes. Voters are told to insert the stylus provided into the hole next to their candidate of choice. The goal of the voting machine set up is that the stylus will be inserted in such a way that a "chad," one of the perforated squares, is completely separated from the ballot. If this happens a machine reader will later be able to count the votes reflected on the ballot. Unfortunately, a chad does not always fully separate from a ballot when punched by a stylus. The chad may only partially detach from the card, or, if the voting machine becomes clogged with chad from previous voters, the ballot may only be "dimpled." The machine reader will not be able to read the ballot. Such uncounted ballots are called "undervotes."

Because of the high percentage of undervotes created by punch card voting systems, the vast majority of counties in Florida do not use them. In Broward County, the undervote in the November 7, 2000, election for President was over 6,000 ballots. In Palm Beach County it was an incredible 10,750 ballots. Absent a manual recount, the votes reflected on these ballots would not be counted in the election.

The dislodging of chad from punch card ballots is a consequence of the fact that partially dislodged chads remain attached to the cards. See Decl. of Rebecca Mercuri, App. of Appellee-Intervenor Florida Democratic Party in *Siegel*, No. 00-15981-C (CA11) tab 16, ¶ 9. Contrary to the suggestion of Petitioners' filing, it is virtually impossible to dislodge chads that have not already been partially dislodged. See Lee Gomes, *Chads - How Tough Are They?*, WALL ST. J., Nov. 22, 2000, at B1.

At the conclusion of those initial recounts, each of the four counties ultimately determined that the sample had revealed tabulation discrepancies that could affect the outcome of the election and decided, consistent with the requirements of Section 102.166(5)(c), to manually recount *all* of the ballots cast in their respective counties in accordance with Florida Statutes Section 102.166(5)(c).

Petitioner Bush did not request a manual recount in any Florida county. (Neither did he then or at any time since object to including hundreds of ballots in his favor that were counted by hand initially and in the initial recount.) Instead, on November 11, 2000, a day when he could himself still have sought countywide recounts in most Florida counties, he filed the *Siegel* case (in which Petitioners now seek certiorari before judgment) in the U.S. District Court for the Southern District of Florida seeking to have the federal courts enjoin the ongoing Florida process for counting ballots in its election. In the complaint, and despite the fact that they had neither requested nor been denied manual recounts anywhere in Florida, Petitioners alleged that the manual recounts in four counties, which had not yet begun, would violate Equal Protection, Due Process, and the First Amendment.

On November 13, 2000, following briefing by the parties, a district court properly denied Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction through an extensive Order (the "Order"), *Siegel* v. *LePore*, No. 00-9009-civ, 2000 WL 1687185 (S.D. Fla. Nov. 13, 2000), on the grounds that: (a) federal court intervention would inappropriately interfere with Florida's selection of its presidential electors; (b) the Florida statute providing for the manual recounting of election results, Fla. Stat. § 102.166, is reasonable and non-discriminatory and does not violate the First or Fourteenth Amendments or result in a constitutional

deprivation of any kind; (c) Petitioners' alleged injuries are speculative and far from irreparable; and (d) Petitioners failed to present evidence that they lack an adequate state law remedy. Petitioners' claims, the court held, did not demonstrate "the clear deprivation of a constitutional injury or a fundamental unfairness in Florida's manual recount provision." Order at 24. Moreover, the court noted, Petitioners' allegations that manual ballot recounts are unreliable were similar to the garden-variety election disputes that federal courts routinely decline to consider. Finally, the court noted that it was not in the public interest to prevent the revelation of the results of a recount, truth being an essential element of a democracy. It is in the appeal of that Order denying a preliminary injunction – and only that order – that the *Siegel* Petitioners seek certiorari before judgment in the Eleventh Circuit.[3]

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[3] Governor Bush appealed the denial of the preliminary injunction to the United States Court of Appeals for the Eleventh Circuit and sought an injunction pending appeal from that court. After directing that the cause would be heard *en banc* and ordering briefing, the court of appeals denied the emergency motion for an injunction pending appeal. Like the district court, the court of appeals found that states had the primary authority to determine the manner of appointing presidential electors and to resolve controversies concerning that process. Because the State of Florida had in place procedures by which Governor Bush could assert his constitutional claims in the courts of that State, the court of appeals held that he had not demonstrated a substantial threat of irreparable injury sufficient to warrant extraordinary relief. The court of appeals granted, however, Governor Bush's motion for an expedited briefing schedule and later issued a scheduling order. Under the present order, Governor Bush is directed to file a supplemental brief no later than Monday, November 27, 2000, at 12 noon, describing the impact of the Florida Supreme Court's opinion on the claims pending before the Eleventh Circuit. Appellees must file briefs by Tuesday, November 28th at 12 noon and Governor Bush's reply brief is due on Tuesday, November 28th at 10 p.m. If oral argument is deemed necessary, it will be held on Wednesday, November 29th at 1:30 p.m.

D. The Florida Supreme Court Decision at Issue in the *Bush* Petition

Once a county canvassing board certifies an election, it transmits the results to the Florida Secretary of State, who then transmits them to the Elections Canvassing Commission so that it can declare the winner for each office. Two Florida statutes purport to define the obligation of the county canvassing boards to transmit their certifications to the Secretary of State. Section 102.111 provides that county returns must be transmitted to the Secretary of State no later than 5 p.m. of the seventh day following the election and that any missing counties "***shall** be ignored.*" By contrast, the later-enacted Section 102.112(1) provides that any county returns not received by 5 p.m. on the seventh day "***may** be ignored.*" Section 102.112(2) imposes a fine of $200 for each county canvassing board member for each day that county's returns are late. The Florida Supreme Court decision of which the *Bush* Petitioners seek review involves only the interpretation of these provisions of State law.

The lawsuit that forms the basis for the *Bush* Petition was filed in the Circuit Court of the Second Judicial Circuit in Leon County on November 13, 2000. Originally brought by Volusia County, but subsequently joined by Palm Beach County, it sought a declaratory judgment that the county was not bound by the November 14, 2000, deadline set by the Secretary of State (Petitioner Bush's state campaign co-chair) for submitting certified vote totals and an injunction prohibiting the Secretary from ignoring election returns resulting from manual recounts authorized by Florida law but submitted after that date. On November 14, 2000, the Leon County court held that although counties did have to comply with the statutory deadline, they could file supplemental returns reflecting the outcome of hand recounts. The Court admonished the Secretary that she could not decide in advance whether to exercise her discretion to accept late-filed returns, but had instead to consider the reasons offered for the late filing before deciding whether it would be accepted or not. The counties appealed to the First District Court of

Appeals.

In response to the Leon County order, Secretary Harris issued a directive requiring that all counties intending to submit late returns inform her of that fact and the reasons for the late returns by 2:00 p.m. on Wednesday, November 15. Four counties did so. After the Secretary concluded that the reasons supplied by the counties for submitting manual recounts were insufficient to justify the acceptance of late returns and again announced that she would not include the results of any manual recounts completed after November 14 at 5:00 p.m., the Florida Democratic Party and Vice-President Gore filed a motion in the Leon County Circuit Court seeking to enforce that court's prior injunction against the Secretary. On Friday, November 17, 2000, the Leon County court announced its opinion that the Secretary's actions had not violated the court's injunction. The Florida Democratic Party and Vice-President Gore appealed, and the First District Court of Appeals certified both appeals for immediate review by the Florida Supreme Court. On Tuesday, November 21, 2000, after full briefing and oral argument, that court issued the decision below.

The Florida Supreme Court found that the questions before it included the following issues of Florida law:

> "Under what circumstances may [a County Canvassing] Board authorize a countywide manual recount pursuant to section 102.166(5); must the Secretary [of State]" and "[State Election] Commission accept such recounts when the returns are certified and submitted by the Board after the seven day deadline set forth in sections 102.111 and 102.112?"

Slip op. at 10. The Court noted pointedly that "Neither party has raised as an issue on appeal the constitutionality of Florida's election laws." *Id.* at n.10.

The Court stated that it would resolve the issues according to familiar principles of statutory interpretation, guided by an appreciation of the importance of the right to vote under Florida

law. "Where the language of the Code is clear and amenable to a reasonable and logical interpretation, courts are without power to diverge from the intent of the Legislature as expressed in the plain language of the Code." *Id.* at 24. "[H]owever, chapter 102 is unclear concerning both the time limits for submitting the results of a manual recount and the penalties that may be assessed by the Secretary." *Id.* "In light of this ambiguity, the Court must resort to traditional rules of statutory construction in an effort to determine legislative intent." *Id.*

The Florida Supreme Court applied four traditional canons of construction: "First, it is well-settled that where two statutory provisions are in conflict, the specific statute controls the general." *Id.* at 24. "Second, it is also well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute." *Id.* at 25. "Third, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision." *Id.* at 26. "Fourth, related statutory provisions must be read as a cohesive whole." *Id.*

Based on these unexceptional principles of statutory construction, the unanimous Court, per curiam, determined that consistent with the permissive language of Section 110.112, the Secretary was not required by the Election Code to ignore the results of manual recounts, even when the recount could not be completed by the seven-day deadline specified in those sections. *Id.* at 18-29.

In light of the "preeminent status the right of suffrage has been consistently accorded in Florida law," *id.* at 30, the Court concluded that "the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances * * * ." *Id.* at 32. In this case, ignoring the returns would be appropriate under Florida law only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process

in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to Section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process pursuant to 3 U.S.C. §§ 1-10. *Id.* at 33.

In light of the unique circumstances of the case, the court invoked its equitable powers to fashion a remedy that would allow a fair and expeditious resolution of the questions presented. *Id.* at 39. After noting that the court at oral argument had inquired whether the presidential candidates were interested in the court's consideration of reopening the opportunity for recounts in additional counties, and that neither candidate requested such an opportunity, *id.* at 40 n.56, the court set deadlines designed to address the state law contest and federal electoral college deadline points noted above. Specifically, the court ruled that the Secretary should accept amended certificates reflecting manual recounts if they are filed by 5:00 p.m. on Sunday, November 26, 2000 (or Monday morning, at the Secretary's option).

E. The Petitions for Certiorari

Pursuant to the Florida Supreme Court's ruling, manual recounts continue in Broward and Palm Beach counties. In their petitions, Petitioners seek to bolster their unusually weak federal claims with wild, irresponsible and utterly unsupported allegations concerning the conduct of those recounts. This Court should be particularly aware that this material, which is untested and which we believe to be utterly false, has never been presented to any court before now and is not a part of the record in either of the cases of which Petitioners seek review. In any event, the conduct of the recounts is of course subject to state court oversight, and Petitioners have available to them ample means under state law to challenge the conduct of any manual recount, including challenges to the inclusion in the final tally of any ballot that they believe should not have been counted, or to the exclusion of any ballot that they believe should have been

counted. See Fla. Stat. § 102.168(3)(c). The state forum provided by statute would be the appropriate place to bring in the first instance any complaints about the conduct of the ongoing manual recounts, rather than raising such complaints before this Court in petitions seeking review of decisions having nothing to do with that question, and in which those complaints were neither raised nor decided below.

In any event, the Court should also rest assured that what is actually happening in Broward and Palm Beach counties is nothing like Petitioners describe. As recently as last night, Petitioners asked the court of appeals to supplement the record with numerous affidavits and news reports detailing "ballot abuse." Taken collectively, the affidavits allege that "unaccounted for chad" is being dislodged from the ballots as they are counted, that a few ballots were temporarily placed on the wrong pile, that two ballots were folded and a few others twisted, and that one vote counter "smelled rum" from a source he could not identify while in the counting room. Not only are these allegations far too trivial even to approach the standard necessary to assert a constitutional violation or to outweigh the countervailing interest in counting the tens of thousands of ballots not counted by the machines, they are contradicted by facts that are in the record. Moreover, reliable evidence contradicts Petitioners' contention that the counting rooms themselves are circus-like or that the counters are deliberately seeking to alter the ballots. Palm County Canvassing Board Chair Judge Charles Burton testified about the recount process underway in that county before the Palm County Circuit Court on November 22, 2000. In that testimony he confirmed that the atmosphere in the counting rooms was appropriate, that the vote counting was proceeding in an orderly way, and that ballots were not being degraded by the recount process.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS RAISE NO SUBSTANTIAL FEDERAL CLAIM AND THIS COURT'S INTERVENTION WOULD DISSERVE THE NATIONAL INTEREST.

I. PRINCIPLES OF FEDERALISM COUNSEL STRONGLY AGAINST ACCEPTING PETITIONERS' INVITATION TO INTERFERE WITH FLORIDA'S ELECTORAL PROCESS

The authority of the States to establish principles and procedures for selecting their electors is fundamental to state sovereignty. By expressly providing for state discretion, the Framers constitutionalized each state's right to organize and administer elections in the manner that best reflected the will of its respective citizenry, thereby reinforcing the decentralized nature of American Government. Petitioners ask this Court to intervene in this fundamental state matter and to interfere with the extensive, constitutionally authorized statutory process provided by Florida for selecting presidential electors. There is no basis for that request.

The Florida legislature exercised its constitutional authority by deciding that presidential electors are to be selected by popular vote in accordance with that state's election laws. See Fla. Stat. § 103.011. Moreover, as described above, it enacted a specific set of procedures to be followed for recounting (including manual counting) and confirmation of ballots cast for the purpose of designating presidential electors. See generally Fla. Stats. §§ 102.061, 102.111, 102.112, 102.141, 102.166, 97.021, 101.5603. The manual recount now underway was triggered under state law by anomalies in initial automated counts and was the object of a timely and proper request. Florida has embarked upon an orderly and structured process pursuant to its comprehensive statutory system to enfranchise

voters by attempting to count accurately the votes cast. That process appropriately includes a combination of manual and automated ballot counts. Petitioners ask this Court effectively to substitute its judgment for that of Florida, which enacted detailed election procedures through the lawful exercise of its authority over the appointment of electors. To do so would violate Article II, Section 1, Clause 2, of the U.S. Constitution, ignore 3 U.S.C. § 5, and implicate significant Tenth Amendment concerns.[4]

This lawsuit thus is a patent attempt to federalize a state law dispute over whether a manual recount is authorized and appropriate. The manual recount not only is fully authorized under Florida law, it has now been expressly approved by a unanimous Florida Supreme Court based on its longstanding adherence to the principle of Florida law that the will of the people is paramount. Slip op. at 9. The Florida Supreme Court has carefully preserved the right of Petitioners or others to contest the certification of an election pursuant to Florida law. Intervention by this Court in this ongoing process could cause irreparable delay at a critical moment and would work a significant intrusion into a matter – the selection of electors – that is both fundamental to state sovereignty and constitutionally reserved to the States.

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[4] An injunction prohibiting a manual recount would do more than *forbid* the State from engaging in a challenged practice. Given the State's obligation under Article II of the Constitution to compose a slate of electors, such an injunction would affirmatively *force* the State to conduct its vote count and verification according to a particular federal vision of how that count and verification should proceed. Cf. *Printz* v. *United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). Indeed, the very suggestion that federal courts might reach into state governmental machinery to tell the states how to make and interpret their own laws would fly in the face of basic principles of federalism. See *New York* v. *United States*, 505 U.S. 144, 178 (1992) (Congress may not command states to legislate).

II. NOTHING IN FEDERAL LAW PROHIBITS THE FLORIDA SUPREME COURT'S ROUTINE INTERPRETATION OF FLORIDA'S ELECTION LAW

Petitioners make the stunning argument that federal law somehow disables the Florida courts from playing their ordinary role in this case of interpreting Florida law, and that federal law overrides the Florida court's determination that the seven-day deadline contained in Fla. Stats. §§ 102.111 and 102.112 does not stop the manual recounting of ballots or the inclusion of those recounts in the final tally. See *Bush* Pet. at 12-18. The flimsiness of this argument is self-evident.

1. Title 3. The federal statute principally invoked by Petitioners, 3 U.S.C. § 5, provides that each state's procedures for settling "any controversy or contest concerning the appointment of all or any of the electors" shall be conclusive with respect to the choice of that state's electors if the state procedures were "provided[] by laws enacted prior to the day fixed for the appointment of the electors." Petitioners argue that the decision of the Florida Supreme Court somehow violated this statute by creating a "new legal rule[]" that would apply "retroactively." *Bush* Pet. at 13-17.

To begin with, Petitioners' argument is based on a flat misstatement of the requirements of the statute, which in fact provides that disputes must be resolved "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. There thus is literally nothing to Petitioners' argument. The laws of Florida, of course, established the state judiciary as the mechanism for deciding "controvers[ies] and contest[s]" about all questions of Florida law, and not just those concerning appointment of presidential electors. See Fla. Const. art. V, § 1 ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts."); *id.* art. V, § 20(c)(3) (granting circuit courts original

jurisdiction "in all cases in equity" and reaffirming the Supreme Court's pre-existing jurisdiction).

In any event, the decision by the Supreme Court of Florida amounts to an ordinary act of statutory interpretation of a law enacted prior to the election, not to a new "enactment." This is clear from even a cursory review of the opinion of the Florida Supreme Court below. The court dealt with the conflict between the provision of Florida law that said that returns filed after seven days "shall" be ignored, and the parallel provision saying that they "may" be ignored, by giving credence to the more specific, and the more recent, provision, a canon of construction certainly familiar to this Court as well. See Slip op. at 24-25. The court also recognized that the provision for fines for late submission of returns implied that they could, indeed, be accepted late. *Id.* at 27. It concluded, in light of the state constitution and the provisions outlining detailed procedures for manual recounts, that the Secretary's discretion to ignore the results of those manual recounts was strictly limited. *Id.* at 30-35. We respectfully submit that the decision below is persuasive, but whether one agrees or disagrees with it, it cannot be denied that it is an ordinary interpretation of a complex statutory scheme.

Thus, the questions purportedly framed in the petition are not in fact presented by this case. The Florida Supreme Court's routine interpretation of its statutory scheme does not "change the rules" in any way that implicates federal law. Petitioners seek to transform their disappointment with the Florida Supreme Court's authoritative interpretation of Florida law into a "constitutional" claim by arguing that it amounted to a change in the rules after the fact. If they were correct that they thereby stated a constitutional claim, every disappointed state court litigant would be able to bring a similar challenge in federal court. Permitting our state courts to interpret their laws – in ways that will, by definition, disappoint one or another litigant – of course does not violate the federal Constitution. At bottom, Petitioners' contention is that the Florida Supreme Court

committed an error of state law. This argument does not describe post-election judicial legislation, so as to implicate 3 U.S.C. § 5 or Article II, § 1, nor does the argument state a due process claim. A "'mere error of state law' is not a denial of due process." *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982) (quoting *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948)). [5]

2. Article II. Petitioners' argument that the delegation of authority to the state "Legislature" in Article II eliminates the state courts' power to interpret state law amounts to much the same thing: a request that this federal court alter the state Supreme Court's interpretation of state law. See *Bush* Pet. at 19 (repeating Petitioners' unavailing argument before the state Supreme Court about what the "manner" of appointed electors is under state law). The delegation, like other delegations of authority to the States, see U.S. Const. art. I, § 4, means that the procedure for appointing electors is a matter of state law, the ultimate meaning of which must be determined by state, not Federal, courts.

III. THE FLORIDA RECOUNT PROVISIONS ARE UNEXCEPTIONAL; PETITIONERS' SUBSTANTIVE CONSTITUTIONAL CHALLENGE TO THEM IS INSUBSTANTIAL

Petitioners next allege that the manual recounts now being conducted in accordance with Florida law are "selective, arbitrary, and standardless," and thus violate the federal Constitution. See *Siegel* Pet. at 15. The Florida provisions for

[5] "[T]he concept of the separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957). Indeed, "[i]t would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight states." *Id.* at 256 (Frankfurter, J., joined by Harlan, J., concurring in the judgment).

manual recounts are, however, utterly unexceptional. To permit the government of each county to conduct the election within that county has a long and uninterrupted history in this Nation, going back to the founding. The availability of the manual recount as a standard post-election procedure is a longstanding feature of Florida law, and of the law of other States,[6] and has been repeatedly used as part of Florida's system of electoral checks and balances to ensure that all lawfully cast ballots are counted.[7] The Florida scheme provides citizens of each county, and candidates for office within each county, with equal rights. The manual recount procedure violates neither Equal Protection, nor Due Process, nor the First Amendment.

1. Equal Protection. The weakness of Petitioners'

[6] At least 20 other states have enacted statutes allowing or even – as in Texas – encouraging the use of manual recounts to back up punch-card tabulation systems. See Cal. Elec. Code § 15627; Colo. Rev. Stat. § 1-10.5-102(3); 10 Ill. Comp. Stat. § 5/24A-15.1; Ind. Code § 3-12-3-13; Iowa Code § 50.48(4); Kan. Stat. § 25-3107(b); Md. Code § 13-4; Mass. Gen. Laws ch. 54, § 135B; Minn. R. 8235.1000; Mont. Code § 13-16-414(3); Neb. Rev. Stat. § 32-1119(6); Nev. Rev. Stat. § 293.404(3); N.J. Stat. § 19:53A-14; 25 Pa. Code § 3031.18; S.D. Admin. R. 5:02:09:05(5); Tex. Elec. Code § 212.005(d); Vt. Stat. § 2601l; Va. Code § 24.2-802(C); W. Va. Code § 3-4A-28(4); Wis. Stat. § 5.90.

[7] Indeed, the fact that counties have different ballot marking and counting systems justifies the need for statutory checks and balances such as a manual recount process. For example, most counties in Florida utilize an optical scanning vote count system. That system performed with great accuracy during the presidential race, resulting in only a 0.4% undervote rate (4 in 1000 ballots). (See Decl. of Jon M. Ausman, App. Brief of Appellee-Intervenor Florida Democratic Party in *Siegel*, No. 00-15981-C (CA11), tab 13, ¶ 8.) In contrast, punch card systems such as those used in Palm Beach, Broward and Miami-Dade counties experienced a 3.2% undervote rate (32 in 1000 ballots) in the presidential race. (Decl. of Jon Ausman, App. tab 13, ¶ 9.) The manual recount process can ameliorate some of the disparity created by the use of different marking and counting equipment. Such a system not only does not violate the Equal Protection Clause, but it also enhances the equality of the voting process.

constitutional claim is reflected in the imprecision with which they identify the source of the alleged rights at issue. In *Siegel*, their first argument is that the recounts violate "Equal Protection," ostensibly because the recounts that are underway will "dilute" the votes of certain voters "based on the counties in which they live." *Siegel* Pet. at 17.

There is no principle of Equal Protection that is violated by the Florida procedure. The "dilution" cases Petitioners cite, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964), involve the one-person one-vote principle under which voters from different districts cannot be given votes of unequal "weight." This issue is not even presented in an at-large election like the instant one where, although the elections are conducted by individual counties, the winner is determined based on his or her statewide vote. When the state undertakes procedures to ensure that qualified voters' votes are counted, the previously counted votes are not, of course, "diluted" at all. And, as this Court has previously recognized, manual recount procedures, like those that are included in Florida law, are a completely ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, § 4.").[8]

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[8] Petitioners' assertion of a conflict with *Roe* v. *Alabama*, 43 F.3d 574 (CA11 1995) ("*Roe I*"), and *Roe* v. *Alabama*, 68 F.3d 404 (CA11 1995) ("*Roe III*"), also is misplaced. In these cases, an Alabama state court ordered the counting of contested absentee ballots that were neither certified nor notarized as required by Alabama's absentee ballot law and, under standard Alabama practice, would have been excluded. The unlawful vote dilution in the *Roe* cases is quite different from this case. The availability of the manual recount as a standard post-election procedure is a longstanding feature of Florida law, and has been repeatedly used as part of Florida's system of electoral checks and balances to ensure that all *lawfully* cast ballots are counted. Petitioners make no allegation that unlawful ballots are now being counted in violation of any statute or general practice of the State of Florida.

Unlike *Roe I*, 43 F.3d at 581, there is absolutely no "post-election

Petitioners also argue that it is constitutionally impermissible for the manual recounts to proceed "selective[ly]" in only certain Florida counties. See *Siegel* Pet. at 18. If Petitioners mean to say that every county must count its voters' votes in precisely the same manner as every other county, they are obviously wrong. As they do in Florida, different counties within states routinely use different equipment and different ballots for the conduct of their elections. This obviously does not systematically "dilute" the votes of particular counties in any way that violates the Equal Protection Clause.

Petitioners also argue that Florida cannot permit recounts limited to certain counties only. But the only relevant case they cite, *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), involved incarcerated prisoners who were denied the right to vote altogether based solely on their county of residence. *O'Brien* stands only for the unremarkable proposition that voters cannot be denied the right to vote solely because of their county of residence. The manual recount provisions of Florida law do not work any such type of irrational discrimination: Florida law does not specify that recounts should occur only in certain counties. Nor were the counties now conducting the manual recounts chosen arbitrarily or on any discriminatory basis. Florida law provides a right to request a manual recount in *any* county in which a candidate has a reason for believing that such a recount might reveal "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). Each candidate and each county was treated

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departure from previous practice" in Florida, and Petitioners cannot show that a manual recount to ensure accuracy will cause any vote dilution. The fact that different components of the verification process may be activated in different counties does nothing to cause votes in other counties to go uncounted. The Equal Protection Clause does not require that all votes be counted by machines or registered in a certain manner. Petitioners' Equal Protection claims are tantamount to contending that unless each county's marking and counting systems are identical in every way there is violation of constitutional rights.

identically. Each candidate was empowered by statute to request manual recounts in any county.

Democrats requested manual recounts in several counties in which the initial machine recount indicated a problem with the machines reading the ballots serious enough that it might affect the outcome of the election. Governor Bush made the conscious, political choice not to request manual recounts in any county, a choice that manifestly does not create a constitutional violation conveniently inuring to his benefit. Indeed, as the Florida Supreme Court pointedly noted, Governor Bush declined the suggestion that the State reopen an opportunity for seeking a manual recount in additional counties. See Slip op. at 40 n.56.

Even if Petitioners had standing to allege a denial of equal protection in the failure to conduct a recount in the counties in which it was not requested, their equal protection claim would be unsupportable in light of the entirely reasonable basis for the distinction in treatment between the ballots of the various counties. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983) (with respect to regulation of elections, "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions"). This is not a circumstance where "the votes of similarly situated voters [are given] different effect based on the happenstance of the county or district in which those voters live." *Siegel* Pet. at 17. The basis for determining where recounts are conducted was not arbitrary. Where there was a request for a manual recount, it was granted. Where there was no request, it was not. Nothing could be more reasonable, or less discriminatory.[9]

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[9] Petitioners also allege that the use of different standards in different counties for determining which ballots to count also amounts to unconstitutional discrimination. *Siegel* Pet. at 18. Despite repeated conclusory allegations to the contrary, all counties are using the *same* standard, the intent of the voter. See Fla. Stat. § 102.166(7). Even if this standard were interpreted slightly differently in different counties, Petitioners would have no more valid an Equal Protection challenge than they would

2. Due Process. Petitioners' due process claim is equally insubstantial. They argue that the manual recount statute prescribes "no meaningful standards" for "determining whether and how" to conduct a manual recount, and that the statute thus invades a "liberty or property interest * * * in an arbitrary and capricious manner." *Siegel* Pet. at 19-20. The premise of this argument, that there are no meaningful standards for officials conducting recounts, is wrong as a matter of Florida law.[10]

Petitioners assert that the county canvassing board's discretion to order a manual recount is absolutely "standardless," and that this violates due process. Petitioners do not, however, allege either that the decisions to recount were made on any arbitrary or improper basis, or that they were denied recounts elsewhere on any such basis. Their complaint instead is that the mere grant of discretion to the county canvassing commissions contained in the statute itself violates the Constitution. See *Barclay's Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 315 (1994) (addressing such a claim).

To prevail on such a facial challenge, Petitioners would have to establish that there are *no* constitutionally valid applications of Florida's statutory process for manual recounting. See *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 11 (1988). Petitioners have made no effort to meet this burden, and they could not do so if they tried. For example, it could not be

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against different counties' use of different balloting equipment. In any event, because this standard is included in state law, its meaning – and any conflicts about it – may ultimately be resolved by the Florida Supreme Court.

[10] It must be remembered that Petitioners are not making a delegation doctrine challenge to the statute, alleging that there is no "intelligible principle" to cabin the administrative agency's discretion. See *Loving* v. *United States*, 517 U.S. 748, 771 (1996) (quoting *Hampton* v. *United States*, 276 U.S. 394, 409 (1928)). Nor could they make one here, since the federal Constitution does not constrain the state governments with federal separation of powers principles as such. See *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957) (plurality op.); *id.* at 235 (concurring opinion).

seriously contended that the Florida statute would be unconstitutional were a county canvassing board to direct a manual recount upon its written, verified conclusion that the county's vote-counting devices had malfunctioned (a circumstance that came to pass in Volusia County). See *Siegel*, 2000 WL 1687185, at *3. Petitioners' facial challenge is entirely groundless.

Furthermore, the statute contains standards sufficient to defeat any due process challenge. The statute makes clear that the purpose for the manual recount is to determine if there is "an error in the vote tabulation which could affect the outcome of the election." Fla. Stat. § 102.166(5). This standard provides the requisite guidance for the county officials' exercise of their discretion whether or not to order a manual recount. As the statute makes clear, the county officials' discretion is not unbounded; rather, they must consider requests for manual recounts in light of this standard: The statute explicitly provides that any request for a manual recount must "contain a statement of the reason the manual recount is being requested." *Id.* § 102.166(4)(a). And, if a manual recount *is* conducted, the county canvassing board is required to take action if, but only if, "the manual recount indicates an error in the vote tabulation which could affect the outcome of the election." *Id.* § 102.166(5).

In light of these provisions, a decision to grant a manual recount on some basis other than an allegation related to the possibility that there might be an error in the vote tabulation would be an abuse of discretion. By the same token, if a candidate provided substantial support for such an allegation, but the county canvassing board denied his or her request for a manual recount, this, too, would amount to an abuse of discretion. And, in either case, an aggrieved party might properly seek relief in state court. This suffices to demolish any claim that the grant of discretion in the statute violates due process. See *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (due process offended, even in context of control of primary

conduct, only by statutes that provide "no standard" for the exercise of official discretion).

Nor do county officials have standardless discretion in determining how to count individual ballots during the manual recount. The touchstone under Florida law is the voter's intent. Indeed, Florida statutory law provides that "[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." Fla. Stat. § 101.5614(2)(a). The manual recount provision expressly provides that "[i]f a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent." Fla. Stat. § 102.166(7). This is a familiar standard used throughout the United States for determining whether and how to count ballots. See, *e.g.*, *Delahunt* v. *Johnson*, 671 N.E.2d 1241 (Mass. 1996); *Pullen* v. *Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990); *Stapleton* v. *Board of Elections*, 821 F.2d 191 (CA3 1987); *Hickel* v. *Thomas*, 588 P.2d 273, 274 (Alaska 1978); *Wright* v. *Gettinger*, 428 N.E.2d 1212, 1225 (Ind. 1981).

Like all issues of compliance with voting laws, the meaning of that standard is "ultimately a judicial question." *State ex rel. Nuccio* v. *Williams*, 120 So. 310, 314 (Fla. 1929). Thus, there is no unacceptable risk that county officials will apply this test subjectively, arbitrarily, or inconsistently. And, in any event, any objection to the way in which a particular ballot has been counted in the application of the intent of the voter standard can be brought in state court, and any question about the meaning of the standard can ultimately be resolved before the State Supreme Court, whose decision will of course have uniform application throughout the State.

3. <u>First Amendment.</u> Nor, for the same reasons, is there any substance to Petitioners' claim of "unconstrained" or "standardless" discretion over the implementation of laws that touch upon First Amendment rights. *Siegel* Pet. at 23. As *Anderson* makes clear, regulations of elections are not judged by

the same standards as regulations that abridge First Amendment rights of Free Speech. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." 460 U.S. at 788 (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)); see also *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992) ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest * * * would tie the hands of States seeking to assure that elections are operated equitably and efficiently."). Petitioners' citation to *City of Lakewood* v. *Plain Dealer*, 486 U.S. 750, 763 (1988), see *Siegel* Pet. at 23, is therefore completely inapposite even if *City of Lakewood*'s demand for constraints on discretion in the licensing of primary conduct protected by the First Amendment could be extrapolated to the completely different context of decisionmaking internal to the government in the search for accuracy in processing ballots – an extrapolation this Court's precedents do not support. Cf. *Bowen* v. *Roy*, 476 U.S. 693, 700 (1986) ("The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.").

Whatever the standard, Florida's manual recount provisions survive it, because they do not provide Florida officials with unconstrained discretion and give such officials *no* power whatever to deny any candidate or voter access to the ballot or the franchise. The statutory standards, enforceable by Florida courts, are sufficient to defeat Petitioners' purported First Amendment challenge.

4. <u>Additional Claims In The *Siegel* Action.</u> Finally, the question that Petitioners purport to present in the *Siegel* matter simply cannot be resolved at this stage given the procedural posture of the case, which the petition notably fails to address. The only issue before the Eleventh Circuit – and therefore the only question that could be presented in this Court *via* the

Petition for Certiorari Before Judgment – is whether the district court properly denied Petitioners' motion for a preliminary injunction on the then-existing record. See *SunAmerica Corp.* v. *Sun Life Assur. Co.*, 77 F.3d 1325, 1333 (CA11) (standard governing such an appeal), *cert. denied*, 519 U.S. 822 (1996); see also *FTC* v. *Affordable Media, LLC*, 179 F.3d 1228, 1235 (CA9 1999) (same). Any purely legal claims asserted by Petitioners that could even arguably be the basis for injunctive relief are meritless for the reasons described above, but Petitioners' fact-based claims regarding the course of the manual recounts, on which the petition principally rests, are not even properly presented. Just as important is the fact that Petitioners nowhere contest the conclusion, supported by the district court's extensive analysis and citation to precedent and the court of appeals' subsequent order denying an injunction, that Petitioners are free to pursue their claims in state, not federal, court.

And, as an entirely separate matter, the *Siegel* Petitioners' fact-bound claims necessarily depend on non-record assertions.[11] Contrary to the Rules of Civil and Appellate Procedure, as well as the clear intent of the Rules of the Supreme Court, Petitioners apparently attempted (but thus far have failed) to file in the court of appeals for use in this Court a barrage of heavily contested affidavits untested in the district court or any other forum, that assertedly establish their federal law claims.[12] If this Court were

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[11] That the case is factbound alone of course counsels against certiorari, particularly given that the question relates to "fact-bound legal consequences of contested district court findings not yet reviewed by the court of appeals." *Kungys* v. *United States*, 485 U.S. 759, 773 n.6 (1988); see also *Heck* v. *Humphrey*, 512 U.S. 477, 480 (1994); *Hayes* v. *Florida*, 470 U.S. 811, 814 n.1 (1985); *Packwood* v. *Senate Select Comm. Ethics*, 114 S. Ct. 1036, 1037 (1994) (Rehnquist, C.J., in chambers).

[12] Petitioners' attempt to purportedly "supplement the record" is impermissible under either FRAP 10(e), *Hoover* v. *Blue Cross & Blue Shield*, 855 F.2d 1538, 1543 n.5 (CA11 1988), or the court of appeals' inherent authority to supplement the record, *Dickerson* v. *Alabama*, 667 F.2d 1364, 1367 (CA11 1982) (limited supplementation permitted only because

to review those claims, the parties apparently would conduct a preliminary injunction hearing as an original matter in this Court (battling affidavit-by-affidavit and expert report-by-expert report), contrary not only to sound principles of judicial administration and settled jurisdictional prerequisites, but also to simple common sense. The district court directed Petitioners to file their claims in Florida's state courts and develop a record there; Petitioners refused. Alternatively, Petitioners could have developed a record in federal district court to support a request for a permanent injunction; they refused, abandoned proceedings in that forum, and rushed to the Eleventh Circuit instead. The only reasonable conclusions from this course of conduct are (i) that Petitioners have thus far delayed resolution of their claims by consciously avoiding development of their factual claims in the appropriate trial courts, all of which have demonstrated a near-Herculean willingness to consider and dispose of such claims expeditiously, and (ii) that if they wish to pursue such allegations, they should do so by returning to those fora and pursuing appropriate, expeditious appeals.

All of the foregoing, of course, also demonstrates that this is not one of those very rare cases in which it would be appropriate for this Court to grant certiorari prior to the court of appeals rendering judgment (particularly given the highly expedited briefing schedule already set by that court, see *Aaron* v. *Cooper*, 357 U.S. 566, 567 (1958)).

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substantive issues were not in serious dispute, remand would serve no purpose, and parties were clearly on notice of the evidence at trial).

Moreover, contrary to the impression left by the petition, Petitioners first filed the petition in this Court and only *later* sought (unsuccessfully so far as we are aware) to file in the Eleventh Circuit their principal "Motion to Supplement" the record. This is nothing more than an effort (i) to mask the reality that Petitioners are seeking to introduce a mountain of heavily contested factual material in this case for the first time *in this Court*, and (ii) to avoid the "clearly erroneous" standard that properly would be applied to factual findings by the trial court in this context, *SunAmerica Corp.*, 77 F.3d at 1333. (Well after being served with the petition, Respondents' counsel *still* had not been served with contents of putative record material.)

CONCLUSION

It is precisely in a case such as this, where the Constitution specifically delegates authority to the States – and where the attention of the Nation is focused on the proceedings – that this Court's obligation is at its peak to preserve the principles of federalism that it has articulated and enforced. These petitions represent a bald attempt to federalize a state law dispute over whether a manual recount is authorized and appropriate. Intervention by this Court in this ongoing process would work a significant intrusion into a matter – the selection of electors – that is both fundamental to state sovereignty and constitutionally reserved to the States. Because there is nothing even approaching a clear showing of a constitutional violation requiring redress by this Court, the petitions for writs of certiorari should be promptly denied.

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No. 00-836 and No. 00-837

IN THE

Supreme Court of the United States

GEORGE W. BUSH,
Petitioner,
v.
PALM BEACH COUNTY CANVASSING BD., *et al.*
Respondents.

NED I. SIEGEL, *et al.*,
Petitioners,
v.
THERESA LEPORE, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit, and the Supreme Court of Florida

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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REASONS FOR DENYING THE WRITS

The petitions for writs of certiorari in *Bush v. Palm Beach County Canvassing Board* and *Siegel v. LePore* should be denied because (1) at the time of their filing and this brief in opposition, neither case is ripe for review; (2) the federal claims asserted in the *Bush* petition were not fairly presented to the Supreme Court of Florida; (3) the federal claims presented in the *Siegel* petition do not merit pre-judgment certiorari; (4) the lack of an adversarially developed factual record counsels against premature judicial action; (5) adequate state remedies exist to address any fairly presented and properly litigated constitutional claims; and (6) the assertion that the "consequences" of these cases "may well include the ascension of a President of questionable legitimacy, or a constitutional crisis" (*Siegel* petition, p. 16), is wrong. Among the hallmarks of our democratic process is patience. The outcome of this presidential election will be known soon, and certiorari review should not be predicated on pessimistic predictions of our citizens' resiliency.

1. Ripeness

The only actual injury that Governor Bush or the Siegel petitioners could suffer would be the certification of Al Gore as the winner of the election in Florida. The winner of the Florida election will be known on Sunday, November 26, 2000 at 5:00 p.m., pursuant to the decision of the Supreme Court of Florida. (We assume that the Florida Secretary of State's office will be open on Sunday and the Monday morning alternative will not be relevant).

Should Governor Bush be certified as the winner of the Florida election, there would be no case or controversy because the injury he complains of – the recount – will not have adversely affected him. As of the time the respective petitions for writs of certiorari were filed on Wednesday evening, November 22, 2000, and when this brief in opposition was filed, on November 24, 2000, the issues presented were not (and are not) ripe for review.

If, on Sunday November 26, 2000, Governor Bush is certified as the winner of the Florida election, the questions presented in the petitions will be moot. We cannot imagine that the unique circumstances bringing us to this juncture would call for utilization of the "capable of repetition yet evading review" exception to the mootness doctrine. This is not a case in which one can say that the questions presented will reoccur, necessitating the exercise of jurisdiction despite the lack of an actual controversy between the named parties. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975).

If, however, Al Gore is certified as the winner of the Florida election, the Article III, § 2 case or controversy requirements will be present. Nevertheless, even in that case, certiorari should be denied.

2. The Federal Questions Were Not Fairly Presented in the *Bush* Case in the Florida Supreme Court

The *Bush* petition asserts that the federal questions were fairly presented to the Florida Supreme Court. *Bush* Petition, p. 9. The Gore Brief in Opposition notes its doubt about

whether that is so. Gore Brief in Opposition, p. 3, n. 1. We submit for this Court's consideration the colloquy between Mr. Carvin, counsel for Governor Bush, and a Justice of the Supreme Court of Florida relating to the presentation of federal questions:

> Q. . . . . so there's not uniformity even within the state as to the type of voting machine that is used, or the procedures that are used.
>
> A. And we have compl–, we have complained about the *ad hoc* nature of the way in which votes are tallied in differential counties. That is a problem.
>
> Q. But when you say you have complained about it. Where has that been complained about?
>
> A. I'm sorry. In federal court, Your Honor. And I'm not trying to introduce that here. We do –
>
> Q. And why are – Let me ask that question, and I'm st– Is there a constitutional attack on this statute being made?
>
> A. Well, we don't think you need reach the question, but yes.
>
> Q. Is that because you're requesting the federal court to reach it and you don't think that the state court has it within its jurisdiction to

> decide whether a statute is being constitutionally applied?
>
> A. Oh no, clearly state courts have that power. I'm simply making the point that this is a much simpler basis for deciding this case without going all the way to the U.S. Constitution, which is, state law clearly prohibits the relief that Petitioners are requesting because state law makes it quite clear that they have no right to ignore the mandatory statutory deadline imposed upon them by state law. They seek to rewrite the statutes. . . .[1]

That colloquy suggests that the federal constitutional claims were not pressed upon the Supreme Court of Florida and that they were not "fairly presented" within the meaning of that term.

3. The *Siegel* Case Does Not Present Issues Requiring the Extraordinary Exercise of Pre-Judgment Certiorari

Rule 11 of this Court provides that certiorari before judgment is appropriate "upon a showing that the case is of such imperative public importance as to justify deviation from

[1] The colloquy is from the taped recording of the oral argument in the Florida Supreme Court on Monday, November 20, 2000. The Justice posing the questions is Justice Pariente. The argument is available for viewing on Web page wfsu.org/gavel2gavel/schedule.htm.

normal appellate practice and to require immediate determination in this Court."

The *Siegel* petitioners maintain that this is such a case because "[t]he election of our nation's highest office *may* turn on the Court's resolution of the issues presented," and that "this Court's immediate intervention is warranted in order to insure that the rule of law is adhered to in this time of great national concern." *Siegel* Petition, p. 3 (emphasis supplied).

Given the fact that the United States Court of Appeals has expedited the briefing schedule in *Siegel*, and has tentatively set oral argument for November 29, 2000, and that a post-judgment decision of that court (if necessary at all considering that Sunday's certification may moot the case), would be subject to immediate review by this Court prior to the December 12, 2000 date for determining Florida's electors, it would be injudicious to circumvent the established appellate processes by granting pre-judgment certiorari.

Public interest does not equal public crisis. This case does not present, at this time, questions of the same magnitude as those presented in *Dames v. Moore*, 453 U.S. 654 (1981); *United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex Parte Quirin*, 317 U.S. 1 (1942). The availability of the Court of Appeals decision-making process, the availability of post-certification contest procedures in the Florida courts, which would enable a true factual record to be developed, and the presence of constitutional and federal statutory mechanisms for resolving disputes regarding selection of Florida's electors (*see* Art. II, §

1, cl.2, U.S. Const.; and 3 U.S.C. § 5) render the request to grant pre-judgment certiorari improvident.

4. and 5. The Lack of a Factual Record and the Availability of State Remedies

Theresa LePore is the Supervisor of Elections of Palm Beach County, Florida. Charles Burton is a County Court Judge in Palm Beach County, Florida. Carol Roberts is a County Commissioner for Palm Beach County, Florida. Together, they comprise the Palm Beach County Canvassing Board. That Board has labored for nearly two weeks to perform its statutory duty with integrity, grace, and non-partisanship.

Several hundred workers, Democrats and Republicans, have labored several thousand hours to recount the ballots to determine the intent of the voters in Palm Beach County. The work has been tedious, but it has been done carefully and openly. Observers from the respective political parties are present in the counting room. That room is open to all to view through the television cameras that carry the proceedings over the County's television channel. Judge Burton has testified in a judicial proceeding (*Florida Democratic Party v. Palm Beach County Canvassing Board*, Fla. 15th Jud. Circ. Case No. CL-0011078-AB) about the process and the methods used to discharge his and the Canvassing Board's statutory obligations to the voters of Palm Beach County and the State of Florida.

When the Palm Beach County Canvassing Board was in doubt regarding its duties under Florida law, it initiated the

original action in the nature of an interpleader in the Supreme Court of Florida, which led to the decision in that court that is now the subject of the certiorari petition in *Bush v. Palm Beach County Canvassing Board*.

No factual record, tested by the adversarial process, has been developed in this case. The charges and countercharges that permeate the submissions of the political candidates should not be the basis upon which this Court should decide any of the questions presented by either side.

The Supreme Court of Florida, the United States Court of Appeals for the Eleventh Circuit, and the United States District Courts for the Southern and Middle Districts of Florida have all recognized that Florida Statute § 102.168 provides a vehicle for a candidate to, post-certification, initiate an election contest that shall be "immediately" heard. Section 102.168(7), Fla. Stat. Should either candidate wish to bring such an election contest after the Sunday, November 26, 2000 certification of the results of the presidential election, that process will permit the development of a factual record, tested in the crucible of examination and cross-examination, which would be consistent with the principle that the adversarial process is the best guarantor of reliable judicial decision-making.

6. There is No Constitutional Crisis

The utilization of Florida's post-election statutory processes, the Herculean efforts of citizens and the Palm Beach County Canvassing Board to accurately count the vote, the immediate responsiveness of the Florida and federal courts to

numerous lawsuits, the extraordinary work of legions of lawyers over the past two weeks, and the diligent reporting of all of these events by the press, prove that every organ of the body politic is alive, well, and working.

At the heart of the *Bush* and *Siegel* petitions for writs of certiorari is the notion that unless this Court acts now, the legitimacy of the presidency of the United States will be compromised. The Palm Beach County Canvassing Board and its members, Theresa LePore, Charles Burton and Carol Roberts, take a more optimistic view. The breathing room that our Constitution and laws give to the honest and unselfish efforts of our country's citizens and elected officials will be respected by the nation. The president who is elected *via* that process – be it George W. Bush or Al Gore – will be the President of all the people. A familiar homily is "every vote counts." Counting those votes does not create a crisis warranting certiorari review.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
NOV 24 2000
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(11) (5)

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BRIEF IN OPPOSITION FOR PALM BEACH COUNTY CANVASSING BOARD

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REASONS FOR DENYING THE WRITS

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The only actual injury that Governor Bush or the *Siegel* petitioners could suffer would be the certification of Al Gore as the winner of the election in Florida. The winner of the Florida election will be known on Sunday, November 26, 2000 at 5:00 p.m., pursuant to the decision of the Supreme Court of Florida. (We assume that the Florida Secretary of State's office will be open on Sunday and the Monday morning alternative will not be relevant).

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because the injury he complains of — the recount — will not have adversely affected him. As of the time the respective petitions for writs of certiorari were filed on Wednesday evening, November 22, 2000, and when this brief in opposition was filed, on November 24, 2000, the issues presented were not (and are not) ripe for review.

If, on Sunday, November 26, 2000, Governor Bush is certified as the winner of the Florida election, the questions presented in the petitions will be moot. We cannot imagine that the unique circumstances bringing us to this juncture would call for utilization of the "capable of repetition yet evading review" exception to the mootness doctrine. This is not a case in which one can say that the questions presented will reoccur, necessitating the exercise of jurisdiction despite the lack of an actual controversy between the named parties. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975).

If, however, Al Gore is certified as the winner of the Florida election, the Article III, § 2 case or controversy requirements will be present. Nevertheless, even in that case, certiorari should be denied.

2. The Federal Questions Were Not Fairly Presented in the *Bush* Case in the Florida Supreme Court

The *Bush* petition asserts that the federal questions were fairly presented to the Florida Supreme Court. *Bush* Petition, p. 9. The Gore Brief in Opposition notes its doubt about whether that is so. Gore Brief in Opposition, p. 3, n.1. We submit for this Court's consideration the colloquy between Mr. Carvin, counsel for Governor Bush, and a Justice of the Supreme Court of Florida relating to the presentation of federal questions:

Q. . . . . so there's not uniformity even within the state as to the type of voting machine that is used, or the procedures that are used.

A. And we have compl–, we have complained about the *ad hoc* nature of the way in which votes are tallied in differential counties. That is a problem.

Q. But when you say you have complained about it. Where has that been complained about?

A. I'm sorry. In federal court, Your Honor. And I'm not trying to introduce that here. We do —

Q. And why are — Let me ask that question, and I'm st– Is there a constitutional attack on this statute being made?

A. Well, we don't think you need reach the question, but yes.

Q. Is that because you're requesting the federal court to reach it and you don't think that the state court has it within its jurisdiction to decide whether a statute is being constitutionally applied?

A. Oh no, clearly state courts have that power. I'm simply making the point that this is a much simpler basis for deciding this case without going all the way to the U.S. Constitution, which is, state law clearly prohibits the relief

> that Petitioners are requesting because state law makes it quite clear that they have no right to ignore the mandatory statutory deadline imposed upon them by state law. They seek to rewrite the statutes. . . .[1]

That colloquy suggests that the federal constitutional claims were not pressed upon the Supreme Court of Florida and that they were not "fairly presented" within the meaning of that term.

3. The *Siegel* Case Does Not Present Issues Requiring the Extraordinary Exercise of Pre-Judgment Certiorari

Rule 11 of this Court provides that certiorari before judgment is appropriate "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

The *Siegel* petitioners maintain that this is such a case because "[t]he election of our nation's highest office *may* turn on the Court's resolution of the issues presented," and that "this Court's immediate intervention is warranted in order to insure that the rule of law is adhered to in this time of great national concern." *Siegel* Petition, p. 3 (emphasis supplied).

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1. The colloquy is from the taped recording of the oral argument in the Florida Supreme Court on Monday, November 20, 2000. The Justice posing the questions is Justice Pariente. The argument is available for viewing on the Web page wfsu.org/gavel2gavel/schedule.htm.

Given the fact that the United States Court of Appeals has expedited the briefing schedule in *Siegel*, and has tentatively set oral argument for November 29, 2000, and that a post-judgment decision of that court (if necessary at all considering that Sunday's certification may moot the case), would be subject to immediate review by this Court prior to the December 12, 2000 date for determining Florida's electors, it would be injudicious to circumvent the established appellate processes by granting pre-judgment certiorari.

Public interest does not equal public crisis. This case does not present, at this time, questions of the same magnitude as those presented in *Dames v. Moore*, 453 U.S. 654 (1981); *United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex Parte Quirin*, 317 U.S. 1 (1942). The availability of the Court of Appeals decision-making process, the availability of post-certification contest procedures in the Florida courts, which would enable a true factual record to be developed, and the presence of constitutional and federal statutory mechanisms for resolving disputes regarding selection of Florida's electors (*see* Art. II, § 1, cl.2, U.S. Const.; and 3 U.S.C. § 5) render the request to grant pre-judgment certiorari improvident.

4. and 5. The Lack of a Factual Record and the Availability of State Remedies

Theresa LePore is the Supervisor of Elections of Palm Beach County, Florida. Charles Burton is a County Court Judge in Palm Beach County, Florida. Carol Roberts is a County Commissioner for Palm Beach County, Florida. Together, they comprise the Palm Beach County Canvassing

Board. That Board has labored for nearly two weeks to perform its statutory duty with integrity, grace, and non-partisanship.

Several hundred workers, Democrats and Republicans, have labored several thousand hours to recount the ballots to determine the intent of the voters in Palm Beach County. The work has been tedious, but it has been done carefully and openly. Observers from the respective political parties are present in the counting room. That room is open to all to view through the television cameras that carry the proceedings over the County's television channel. Judge Burton has testified in a judicial proceeding (*Florida Democratic Party v. Palm Beach County Canvassing Board*, Fla. 15th Jud. Circ. Case No. CL-0011078-AB) about the process and the methods used to discharge his and the Canvassing Board's statutory obligations to the voters of Palm Beach County and the State of Florida.

When the Palm Beach County Canvassing Board was in doubt regarding its duties under Florida law, it initiated the original action in the nature of an interpleader in the Supreme Court of Florida, which led to the decision in that court that is now the subject of the certiorari petition in *Bush v. Palm Beach County Canvassing Board*.

No factual record, tested by the adversarial process, has been developed in this case. The charges and countercharges that permeate the submissions of the political candidates should not be the basis upon which this Court should decide any of the questions presented by either side.

The Supreme Court of Florida, the United States Court of Appeals for the Eleventh Circuit, and the United States District Courts for the Southern and Middle Districts of Florida have all recognized that Florida Statute § 102.168 provides a vehicle for a candidate to, post-certification, initiate an election contest that shall be "immediately" heard. Section 102.168(7), Fla. Stat. Should either candidate wish to bring such an election contest after the Sunday, November 26, 2000 certification of the results of the presidential election, that process will permit the development of a factual record, tested in the crucible of examination and cross-examination, which would be consistent with the principle that the adversarial process is the best guarantor of reliable judicial decision-making.

6. There is No Constitutional Crisis

The utilization of Florida's post-election statutory processes, the Herculean efforts of citizens and the Palm Beach County Canvassing Board to accurately count the vote, the immediate responsiveness of the Florida and federal courts to numerous lawsuits, the extraordinary work of legions of lawyers over the past two weeks, and the diligent reporting of all of these events by the press, prove that every organ of the body politic is alive, well, and working.

At the heart of the *Bush* and *Siegel* petitions for writs of certiorari is the notion that unless this Court acts now, the legitimacy of the presidency of the United States will be compromised. The Palm Beach County Canvassing Board and its members, Theresa LePore, Charles Burton and Carol Roberts, take a more optimistic view. The breathing room that our Constitution and laws give to the honest and unselfish efforts of our country's citizens and elected officials

will be respected by the nation. The president who is elected *via* that process — be it George W. Bush or Al Gore — will be the President of all the people. A familiar homily is "every vote counts." Counting those votes does not create a crisis warranting certiorari review.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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NOV 24, 2000

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CLERK

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

Response of Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission, to Petition for a Writ of Certiorari

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RESPONSE OF KATHERINE HARRIS, FLORIDA SECRETARY OF STATE, AND KATHERINE HARRIS, LAURENCE C. ROBERTS, AND BOB CRAWFORD, AS MEMBERS OF THE FLORIDA ELECTIONS CANVASSING COMMISSION, TO PETITION FOR A WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE AND FACTS AND PROCEDURAL HISTORY

The Secretary of State of Florida (the "Secretary") and the Florida Elections Canvassing Commission (the "Commission")[1] are respondents in this action since they were parties below. In presenting its response, the Secretary and the Commission are focused on Florida's election law as it stood prior to November 21, 2000 (the "Pre-Decision Period"), and as it now stands (the "Post-Decision Period"). November 21, 2000, is the date that the Supreme Court of Florida handed down the decision Petitioners urge this Court to review: *Palm Beach Canvassing Board v. Katherine Harris, et al.*, Case Nos. SC 00-2346, SC 00-2347, and SC 00-2348 (Fla. filed Nov. 21, 2000). Florida's Election Code is set forth at chapters 97 through 106, Florida Statutes.[2]

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1. The Commission is composed of the Governor, the Secretary, and the Director of the Division of Elections. In this case, Florida's governor recused himself from the certification process and Florida's Commissioner of Agriculture, Bob Crawford, was appointed to fill the vacancy.

2. The Election Code is divided by chapter as follows: ch. 97 ("Qualifications and Registration of Electors"); ch. 98 ("Registration

(Cont'd)

The central focus of this case deals with Chapter 102, which is entitled "Conducting Elections and Ascertaining the Results."

The Secretary is an independently elected constitutional officer within Florida's scheme of an independently elected executive cabinet, composed of a secretary of state, attorney general, treasurer, comptroller and commissioners of agriculture and education. The Secretary is also the state's chief elections officer. *See* Fla. Const., art. IV, § 4(b); Fla. Stat. § 97.012. As such, the Secretary is charged with, among other duties, the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. § 97.012(1). The Secretary is also obligated, through the Division of Elections, to "provide advisory opinions when requested by any supervisor of elections . . . relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor . . . has taken or proposes to take." Fla. Stat. § 106.23(2). "The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion. . . ." *Id.*

After the polls close on an election day, two separate periods come into play: (1) the pre-certification protest

(Cont'd)
Office, Officers, and Procedures"); ch. 99 ("Candidates, Campaign Expenses, and Contesting Elections"); ch. 100 ("General, Primary, Special, Bond, and Referendum Elections"); ch. 101 ("Voting Methods and Procedure"); ch. 102 ("Conducting Elections and Ascertaining the Results"); ch. 103 ("Presidential Electors; Political Parties; Executive Committees and Members"); ch. 104 ("Election Code: Violations; Penalties") ch. 105 ("Nonpartisan Elections"); and ch. 106 ("Campaign Financing").

period (the "Protest Period") (Fla. Stat. § 102.166); and (2) the post-certification contest period (the "Contest Period") (Fla. Stat. § 102.168). The Protest Period commences immediately upon conclusion of the election and concludes when the last county canvassing board certifies its returns. Once that occurs, the Commission certifies the election returns on two separate dates. The first date is seven days after the conclusion of the election, which is when each county canvassing board is required to report its final returns to the Division of Elections.[3] Three days later, on the tenth day after the election has concluded, a supplemental filing is made by the county canvassing boards which adds the overseas absentee ballots that have been received by midnight on the tenth day. The combined returns are then certified by the Commission and become the final official returns. Once the combined returns have been received, the Commission certifies the election and declares the winners, after which the Contest Period commences.

Usually, there is no specific end to the Contest Period,[4] as there have been times in Florida when a contest resulted in the removal and substitution of an officer already well into a term. The Contest Period for any presidential election must, however, be completed six days before the meeting of the state electors, which in this case is December 18, 2000. *See* 3 U.S.C. § 5 (1997). Thus, for the general election of 2000, the Protest Period was to begin at the time the polls

3. This year all county canvassing boards certified their returns by 5 p.m. on November 14, within the seven day statutory period prescribed by Fla Stat. § 102.11 (2000).

4. A contest must be initiated within 10 days of when the last county canvassing board certifies its returns to the state. Fla. Stat. § 102.168(2).

closed at 8 p.m. on November 7 and end at 5 p.m. on November 14, a period of seven days. The Contest Period was to commence at 5:01 p.m. on November 14, and was to end at midnight on December 12, 2000, or 28 days.

As noted, after the conclusion of an election, any voter or candidate can file a Protest claiming that the election returns are erroneous (Fla. Stat. § 102.166(1)). Procedures are set forth for the review of elections by paper ballots, voting machines, and "electronic or electromechanical equipment." There is a provision for manual recounts, but only the candidate or a political party can request such a review. Fla. Stat. § 102.166(4)(a). The individual voter has no right to ask for a manual recount.[5]

County returns (with the exception of the overseas ballots) were due to the Department of State by 5 p.m. of the seventh day following the election or they would be ignored. *See id.*[6]

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5. Based upon the plain statutory language and legislative history, the Secretary and the Commission here maintained that manual recounts are only intended to be used when some type of machine or electromechnical process is involved. App. at 1a.

6. In 1989, the Florida legislature amended the Election Code by adding section 101.112 (directed to county canvassing boards) which states, in pertinent part, the general rule set forth above regarding the seven-day deadline, but adds that "[i]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." *See id.*, § 102.112(1). The amendment also provided a $200 a day fine to be levied against the canvassing board members personally for late returns. *See id.*, § 102.112(2). This was done at the same time as the amendments to section 102.166, Florida Statutes, in response to the machine voting problems that occurred in the Mackay-Mack U.S. Senate race in 1988. *See infra* at 13-14, n.10.

Before final certification by the county canvassing board for any particular county, the candidates, their political parties or a political committee that supports or opposes an issue that appeared on the ballot are permitted to file a written request with the county canvassing board for a manual recount. *See id.* §§ 102.166(4)(a) & (b). If the county canvassing board authorizes the manual recount, the recount must include "at least three precincts and at least 1 percent of the total votes cast for such candidate or issue." *See id.* §§ 102.166(4)(c) & (d). If the initial manual recount indicates "an error in the vote tabulation which could affect the outcome of the election," the board could: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the department of state to verify the vote tabulation software; or (c) manually recount all ballots.

On November 7, 2000, voters across the nation cast their ballots for, among other offices, President and Vice President of the United States. In Florida, the initial returns from all the counties showed statewide that Governor George W. Bush was slightly ahead of Vice President Albert Gore, Jr. Because the difference was less than one-half of one percent, an automatic statewide recount was conducted by all counties the following day. *See id.* § 102.141(4). After the recount, Governor Bush maintained a narrow lead over the Vice President. On November 9, the Florida Democratic Executive Committee requested manual recounts in the following counties: Volusia, Palm Beach, Broward and Miami-Dade.

On November 13, 2000, the Palm Beach Canvassing Board ("Palm Beach") requested, in writing, that the Division issue a written opinion as to whether the Department of State or the Commission had the discretion to extend the seven-day statutory filing deadline for election returns. By separate

cover, Palm Beach also requested that the Division issue a written opinion as to when a county could authorize a manual recount of ballots.

Later that day, in response to a specific request from election officials, the Division issued two formal advisory opinions. *See* Fla. Stat. § 106.23. In response to the first request from Palm Beach, the Division issued Opinion DE 00-10 advising Palm Beach that election results not certified by 5 p.m. Tuesday, November 14 could not be counted in the certification of the statewide results. In response to the second request from Palm Beach, the Division issued Opinion DE 00-13 (App. at 1a) advising Palm Beach that the "error in vote tabulation" language in the statute that serves as the legal basis for a manual recount means "a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots."

Also on November 13, the Secretary notified all 67 county elections supervisors that the statutory deadline of 5 p.m. Tuesday, November 14 would not be extended. The Secretary further informed these parties that returns (other than overseas ballots) not filed by the deadline would not be included in the certification of statewide results.

The following day, in response to the requests from Palm Beach County officials, Florida's Attorney General, Bob Butterworth, issued a conflicting opinion, Opinion 00-65 (App. at 5a), advising Palm Beach that the "error in vote tabulation" means "a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4), Florida Statutes." App. at 11a.

Volusia County had previously filed a lawsuit in Leon County, seeking to enjoin the Secretary and the Commission from certifying election results without including returns filed after the seven-day statutory deadline. The Palm Beach County Canvassing Board, Vice President Gore and the Florida Democratic Party ("Democrats") intervened. After an initial hearing, Leon County Circuit Court Judge Terry P. Lewis directed the Secretary "to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion." Bush App. at 50a.

The Secretary's first action in response to the order was to develop a set of evaluative criteria that would be used to decide whether to allow a late filing. First, a set of factors that could justify a late filing was developed. The existence of one or more of these factors, which were drawn from Florida elections case law, could have justified an allowance of a late filing. These factors (and their supporting case law) were:

- Whether there is any indication of voter fraud that could affect the outcome of the election. *In re: Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992);

- Whether there was substantial noncompliance with statutory election procedures, causing reasonable doubt to exist as to whether the certified results express the will of the electorate. *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998);

- Whether election officials had made a good faith effort to comply with the statutory deadline, but were prevented from doing so by an act of God or similar circumstance beyond their control.

The Secretary next determined, again based on a review of the pertinent case law, that the following election irregularities would *not* constitute a sufficient reason for violating the statutory deadline:

- Noncompliance with statutory election procedures and/or voter error, where there is a reasonable expectation that the results express the will of the voters. *Beckstrom*, 707 So. 2d at 725;

- The use of a ballot design that was confusing to some voters because of the location and alignment of candidates names, so long as a reasonable voter could make his or her choice by exercising reasonable time and study. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974);

- Any other situation that presented "nothing more than a mere possibility that the outcome of the election would have been [a]ffected." *Hogan*, 607 So. 2d 508, 510 (Fl. 4th DCA 1992).

As before, the Secretary's decision was based primarily on reported election cases, which found similar circumstances to be insufficient to justify interference with certified election results. The factors applied thus reflected the law of Florida existing before the Supreme Court of Florida's November 21 decision. *See* App. at 27a-29a.

Thereafter, in accordance with Judge Lewis' order, the Secretary distributed a memorandum to all of Florida's 67 counties requesting that they provide a written statement, including the facts and circumstances that would justify any late filed returns by 2 p.m. Wednesday, November 15.

On Wednesday, November 15, the canvassing boards for Palm Beach County, Broward County, Miami-Dade County, and Collier County, responded to the Secretary's memorandum, each providing the facts and circumstances that they believed would provide justifications for the Secretary waiving or extending the statutory deadline to permit later changes to their already filed returns. After carefully reviewing each request in light of pre-established criteria based on long-standing Florida law, the Secretary made a determination that none of the facts before her justified a waiver or extension of the deadline. The Secretary and the Division both consistently took the position that voter error was not a basis for initiating a manual count nor to extend the seven day statutory deadline to do so. Volusia County completed its manual hand count before the 5 p.m. deadline on November 14, and those results were included in Volusia County's timely return.[7]

The Commission certified the timely-filed November 14, 2000, election results for all but the overseas ballots. The certification reflects 2,910,492 votes for Governor George W. Bush and Secretary Dick Cheney and 2,910,192 for Vice President Albert Gore, Jr. and Senator Joe Lieberman.

On November 16, the Democrats filed an Emergency Motion to Compel Compliance with and for Enforcement of Injunction

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7. Neither the Secretary nor the Division are permitted to go beyond the local canvassing board's certification. *See* Fla. Stat. § 102.31.

("Emergency Motion"), and asserted that the Secretary acted arbitrarily and in contempt of Judge Lewis' order by refusing to accept the returns filed after the statutory deadline.

On November 17, Judge Lewis denied the Emergency Motion, ruling that the Secretary had not acted arbitrarily, and that she "exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." Bush App. at 43a. Later that day, the Supreme Court of Florida *sua sponte* entered an order enjoining the Secretary and Commission from finally certifying the results of the November 7 election and declaring a winner in Florida until further order. Bush App. at 39a.

On November 21, 2000, the Supreme Court of Florida reversed Judge Lewis, holding that manual recounts were not limited to instances of machine error, and that the Secretary had abused her discretion in not accepting returns that were not filed within the seven-day deadline set by the Legislature. In short, the Court enlarged the statutory Protest Period from seven days to 19 days, and shortened the Contest Period from 28 days to 16 days. The Court's holding changed the law in the state of Florida as it existed and was applied before November 7, 2000.

II.

THE FLORIDA ELECTION CODE PRIOR TO AND AFTER THE SUPREME COURT OF FLORIDA'S DECISION BELOW

Before the evening of November 21, 2000, when the Supreme Court of Florida issued the decision below, Florida's Election Code provided long-standing procedures requiring

the reporting of results by specified deadlines, for dealing with errors in vote tabulation, conducting manual recounts in certain limited circumstances involving mechanical or software failure in mechanical voting equipment, certifying electronic results and allowing affected voters to contest the results of an election. In addition, there was a system that accorded much less time to the Protest Period than it did to the Contest Period.

Under the Election Code as it previously existed, any affected voter, political party or candidate could protest election returns before certification of the election results. Fla. Stat. § 102.166(1). In the event of such a protest, the local elections canvassing board had to follow specific procedures to verify the accuracy of the returns. The procedures to be followed varied depending on whether paper ballots designed for hand counting, voting machines, or machine tabulated paper ballots were used. Fla. Stat. § 102.166(3).

As part of section 102.166, only a candidate or political party is also permitted to file a written request with the local canvassing board for a manual recount. Fla. Stat. § 102.166(4)(a). Provided the request was timely, the canvassing board was given discretion as to whether to conduct a manual recount, after conducting a proper, statutorily-defined, test of certain precincts to determine if there was a mechanical or software problem. Fla. Stat. § 102.166(4)(c). The Protest Period had to be completed, and the election results certified to the Florida Secretary of State within seven days of the election. Fla. Stat. § 102.111(1). Immediately upon such certification, the Commission was required to certify the elections results.[8] *Id.*

8. Florida law contemplated that the winner of the election would be declared on the seventh day following the election. Fla. Stat. § 102.111. For federal offices, however, a winner cannot (Cont'd)

The conclusion of this seven-day protest and certification process triggered the right of any affected voter or taxpayer, or as an unsuccessful candidate or party, to file an elections contest. Fla. Stat. § 102.168(1). Unlike the pre-certification protest procedure, the Contest Period allows for a full evidentiary record to be introduced, and all facts and circumstances surrounding the election to be examined in the courts. Fla. Stat. § 102.168. Further, an election contest allows for a single venue in the circuit court serving the state capitol for lawsuits stemming from a statewide election, Fla. Stat. § 102.1685, and grants broad authority to the court to fashion appropriate relief. *See id.* at 102.168(8). The Florida Legislature imposed no specific time limitations on a judicial elections contest, but imposed strict time limits on protests and recounts that precede a certification, which is the prerequisite to a contest.[9]

In response to a protest, Florida law, as it existed prior to November 21, allowed manual recounting to be conducted only in certain limited circumstances. Fla. Stat. § 102.166(5). Both the plain language and legislative history of Florida's

(Cont'd)
be declared until three days later. That is, however, not a matter of state law. A consent decree between the state of Florida and the United States requires Florida to count absentee ballots from citizens living outside the United States that are received up to 10 days following the election. The consent decree was entered into following the enactment of the seven-day certification provisions in the Florida Election Code.

9. The Florida Legislature's intent to have the protest completed within seven days is exemplified by the fact that it imposed strict financial penalties on local canvassing board members who failed to submit timely returns and required the Commission to ignore any counties that failed to file returns within seven days and certify the election results based solely on those returns that are timely filed. Fla. Stat. § 102.112(1).

election statutes indicate that a manual recount of the ballots in a county was proper only when there has been a failure of the vote tabulation system or as required by a circuit court exercising jurisdiction in a properly filed elections contest action.[10] Failure

10. The provisions of section 102.166, Florida Statutes, at issue were enacted by the Florida Legislature in 1989 in response to concerns about computer failure in elections and the use of unreliable software to tabulate votes. Ch. 89-348, § 15 Laws of Florida. These concerns had been raised in the 1988 race for the United States Senate between Buddy MacKay and Connie Mack and in subsequent news articles. The legislature enacted sections 102.166(4)-(10), Florida Statutes, to address these concerns as part of what was called the "Voter Protection Act." The Senate Staff Analysis and Economic Impact statement for the Voter Protection Act noted:

> An incident of mechanical problems with an electronic voting system occurred in Bradenton, Florida where a seventh of the county's precincts had to be counted twice in one election since the ballots were soggy, became warped and were mangled by the voting equipment. Also, an apparent software "glitch" or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.
>
> Other horror stories related to electronic voting systems have been reported on in the media, but in testimony before the Joint Committee on Information Technology Resources in 1989, supervisors of elections pointed out that there can be problems with any kind of voting system. However, many local election officials would agree that state certification procedures and local logic — and — accuracy tests provide a reasonable assurance that "electronic" elections are honestly counted. It is generally agreed that *additional steps* could be taken in Florida *to improve security procedures*, while not hampering the already cumbersome elections process, would enhance, the public's confidence in our voting system.

App. at 15a-16a (emphasis added).

(Cont'd)

of certain voters to properly execute their ballots was not a basis for conducting a manual recount, although this issue could be raised in a post-certification elections contest.[11]

Florida has never recognized a common-law right to protest election results, much less to require manual recounting of machine ballots. Prior to November 21, the right to a manual recount existed only to the extent provided by the Legislature. Florida Statutes section 102.166(5) allowed such a recount *only* when there had been an "error in vote tabulation." This term had consistently been interpreted, prior to November 21, to mean a failure of the tabulation equipment to count properly executed

(Cont'd)

As this legislative history indicates, the statute was intended to provide an alternate recounting procedure to be used in situations in which mechanical or computer problems caused tabulation equipment to fail to function as intended. The legislature never intended for manual recounts to be used to evaluate ambiguous ballots that *voters* failed to properly execute. Consistent with the legislative intent the Division of Elections formal advisory opinion left open the possibility of a full manual recount, but precluded a recount to assign votes to candidates based on improperly executed ballots that cannot be read by properly operating tabulation equipment.

11. The Division Opinion is an administrative interpretation of the statutes within its subject matter jurisdiction and is binding on subordinate agencies such as the Board. This opinion "remains binding until properly amended or revoked by the Division itself, or invalidated by a court having jurisdiction of the matter." *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994); *see also Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840, 844 (Fla. 1993). In contrast, the Board was *not* bound to adhere to the Attorney General's opinion. In fact, it was questionable whether the Attorney General even had the authority to issue an opinion on an election issue, given the specific allocation of this function to the Division of Elections in section 106.23(2).

ballots.[12] *Id*. Thus, when voters failed to mark ballots correctly, there had been no failure in their tabulation under Florida law, and no manual recount was authorized. *Id.*

The Supreme Court of Florida's November 21 decision has made a number of changes in Florida's election laws, setting aside some provisions, and implementing others. It has also recognized equitable principals that take precedence over statutory provisions and the exercise of discretion by the Secretary.

First, the requirement that tabulation of election results be completed within seven days has been eliminated. In its place there is a new, judicially-created time limitation

12. In the weeks before the November 7, 2000, general election, each registered voter in Florida was provided with a sample ballot and detailed instructions on how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in each voting booth. *See* Fla. Stat. § 101.46. In those districts using punch cards, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. App. at 25a. The instructions included this specific direction:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

Id. When voters followed the instructions, including the removal of any loose chips left attached to their ballots, the automatic tabulation accurately tabulated the ballots. There is no contention otherwise. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, would be affected by the manual recount at issue.

that allows at least 19 days to complete the Protest Period before certification, and possibly more when an election protest and request for manual recount have been filed. Bush App. at 38a. Local canvassing board members are now under no duty to comply with the strict time limitations that previously existed and can no longer be fined or have their returns ignored for failing to file certified returns. *Id.*

Second, local canvassing boards may now file amended returns after the statutory deadline, even if they had properly filed returns before the deadline. *Id.* The Secretary of State now has no discretion to reject any such amendment, unless it is so late that it will preclude a candidate or voter from contesting the election or jeopardize the ability of the state to appoint presidential electors within the time limitations of federal law. Bush App. at 37a. Before the November 21 decision, there was no provision in Florida statutory law that allowed returns to be amended, much less amended after the statutory time limitation for final certification and declaration of the winner has passed. There was also no statutory provision that required the Secretary to accept late-filed returns, or limited late filing specifically to situations where the federal time limitations jeopardize Florida's electoral votes. Indeed the existing Florida law required just the opposite: "If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on the file shall be certified."[13] Fla. Stat. § 102.111(1). Late returns, if they

13. This statute governs the Elections Canvassing Commission and sets forth its duties with respect to acceptance of election returns and certification of election results. A related provision, which governs local canvassing boards, states that "[r]eturns must be filed by 5 p.m. on the 7th day following the . . . general election," and puts those boards on notice that "[i]f the returns are not received (Cont'd)

would affect the outcome of the election, could be added only if ordered by a circuit court in an election contest action. Fla. Stat. §§ 102.168(3)(e) and (8). Before November 21, this statute was consistently interpreted to require submittal of returns within seven days. *See Chappel v. Martinez*, 536 So. 2d 1007, 1009 (Fla. 1984) (requiring substantial compliance with the deadline and holding that telephone transmittal before the deadline sufficed).

Third, the Commission is now precluded from certifying election results on the seventh day following the election, as previously required under Florida Statutes sections 102.111, 102.121 and 102.131. Indeed, even where certified returns were filed by all counties within the time limitations that existed before the November 21 decision, the Commission must now wait at least until November 26 to certify the results of the election.

Fourth, the time frame for an election contest, the only procedure available to individual voters to challenge the outcome of the election, is now drastically shorter. Under the prior law, the period for filing a contest would have begun with the final certification of results on November 17, and the contest proceeding could have extend until December 12, the

(Cont'd)
by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." Fla. Stat. § 102.112(1). While this provision may grant the Secretary of State some discretion in deciding whether to accept late returns. The construction by the Supreme Court of Florida to absolutely require late returns to be accepted or to authorize the post-deadline amendment of returns already filed is clearly a change in what might otherwise be understood from reading the provision, even in connection with section 102.112, Florida Statutes.

federal deadline for appointment of presidential electors. Now, any contest cannot begin until the recounts are completed and the results certified. At the earliest, this will not occur until November 28, cutting the contest period from 25 days — already an extremely short period in which to develop a case, conduct discovery, have a trial, and pursue any subsequent appeals — to a mere 16 days.

Finally, but perhaps most importantly, manual recounting may now be used in a significantly broader way than previously available. Prior to November 21, in the absence of a judicial decree rendered in an election contest action, manual recounting was allowed only in the case of mechanical, software or other similar failure in the automated vote tabulation and were considered dehors the common law. The Supreme Court of Florida has now recognized that these rights are equitably required and grounded in Florida constitutional law.

Under Florida Statutes section 102.166(5) a manual recount was a last-resort remedy to be used in areas with automated tabulation systems only when there was no way to mechanically tabulate the ballots. When a sample manual recount indicated a problem with the vote tabulation system, the local canvassing board first attempted to correct the error and recount the remaining precincts with the system under subsection (5)(a). If the error could not be corrected, a board was allowed to request the Department of State to verify the tabulation system under subsection (5)(b). Finally, if the system could not be corrected or verified to work properly, then as a last resort, the board would have manually recounted the ballots under subsection (5)(c). There was never any indication that Florida Statutes section 102.166(5) allowed voter errors caused by improperly marked or punched ballots to be selectively corrected. The statute was enacted to provide a remedy when a vote tabulation system failed to read

properly marked ballots, not to provide local canvassing boards the unbridled discretion to choose the method of tabulating votes on an *ad hoc* basis after an election was completed.

As a result of the Supreme Court of Florida's decision, the Secretary, the Commission and Florida's 67 local elections canvassing boards will now treat the election certification process quite differently than they would have previously:

- Where the Secretary would have previously rejected late filed election returns, she is now required to accept those returns, so long as the late filing does not violate the judicially created test of being "so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process;"

- Where the Commission would have certified the statewide election on November 17 on the certified returns filed by all of Florida's 67 counties, the Commission must now wait on the results of manual recounts conducted in selected areas, delaying final certification until at least November 26 that must include amendments to the November 14 filing other than overseas ballots;

- Where local canvassing boards were previously precluded from conducting manual recounts in the absence of an error in the vote tabulation system, they now will conduct recounts in almost any circumstance;

- Where each county canvassing board would have submitted only one final set of returns, the local canvassing boards may now conduct a series of recounts and amend their prior certification for some time after the deadline to certify has passed; and

- Where a uniform system of automated counting was previously in place, Florida's votes, including votes for the electoral college, will now be decided based on standards developed by individual county canvassing boards in selected areas of the state.

Dated this 24th day of November, 2000.

Respectfully submitted,

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APPENDIX

APPENDIX A — FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS OPINION NO. DE 00-13

FLORIDA DEPARTMENT OF STATE
Katherine Harris
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DIVISION OF ELECTIONS
The Capitol • Room 1801
Tallahassee, Florida 32399-0250
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E-Mail: *election@mail.dos*

November 13, 2000

The Honorable Charles E. Burton
Chairperson
Palm Beach County Canvassing Board
Palm Beach County Courthouse
West Palm Beach, Florida 33401

DE 00-13
Manual Recount Procedures and
Partial Certification of County Returns
§§ 102.166(5) and 102.151, Fla. Stat.

Dear Judge Burton:

This is in response to your request for an opinion. You are chairperson of the Palm Beach County Canvassing Board and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has the authority to issue an opinion to you. Essentially, you ask:

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1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation" that could affect the outcome of an election within the meaning of section 102.166(5), Florida Statutes, thereby enabling the canvassing board to manually recount ballots for the entire county?

2. May a county canvassing board do a partial certification of the votes pursuant to section 102.151, Florida Statutes, for the November 7, 2000 election that excludes the votes for the candidates of the presidential election?

With regard to your first question, section 102.166(5), Florida Statutes, provides that if the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots.

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Therefore, unless the discrepancy between the number of votes determined by the tabulation system

Appendix A

and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any notion specified in section 102.166(5)(a) and (b), Florida Statutes.

With regard to your second question, the answer is yes. The county canvassing board may do a partial certification of the votes pursuant to section 102.151, Florida Statutes, for the November 7, 2000 election that excludes the results of the presidential election.

SUMMARY

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Therefore, unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes. The county canvassing board may do a partial certification of the votes pursuant to section 102.151, Florida Statutes, for the November 7, 2000 election that excludes the results for the presidential election.

Appendix A

Sincerely,

s/ L. Clayton Roberts
L. Clayton Roberts
Director, Division of Elections

Prepared by:
Kristi Reid Bronson
Assistant General Counsel

LCR/KRB/st

APPENDIX B — OPINION OF THE FLORIDA ATTORNEY GENERAL NO. 00-65

STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL
ROBERT A. BUTTERWORTH

November 14, 2000

The Honorable Charles E. Burton 00-65
Chair, Palm Beach County Canvassing Board
County Courthouse
West Palm Beach, Florida 33401

Dear Judge Burton:

On behalf of the Palm Beach County Canvassing Board, you have asked this office's opinion as to the meaning of "error in voting tabulation which could affect the outcome of" an election as that phrase is used in section 102.166(5), Florida Statutes.

I am answering your request fully mindful that just yesterday the Division of Elections rendered Division of Elections Opinion 00-11 to the Chairman of the Republican Party, interpreting the duties of a county canvassing board pursuant to section 102.166(5), Florida Statutes.[1] Because the Division

1. The validity of the opinion of the Division of Elections is questionable since it appears to exceed the authority granted to the division by Florida law. Section 106.23(2), Florida Statutes, provides the division with the authority to render advisory opinions interpreting the election code to, among others, a political party relating to actions such party has taken or proposes to take. Division of Elections Opinion 00-11, however, erroneously seeks to advise a political party about the responsibilities of the supervisor of elections and local canvassing board under section 102.166(5).

of Elections opinion is so clearly at variance with the existing Florida statutes and case law, and because of the immediate impact this erroneous opinion could have on the on-going recount process, I am issuing this advisory opinion.

Section 102.166(4), Florida Statutes, permits a local canvassing board, upon request of a candidate or political party, to authorize a manual recount to include at least three precincts and at least 1 percent of the total votes cast for such candidate.[2] Section 102.166(5), Florida Statutes, provides "[i]f the manual recount indicates an error in vote tabulation which could affect the outcome of the election, the county canvassing board shall" among other options, manually recount all ballots.

Division of Election Opinion 00-11 concludes that the language "error in the vote tabulation" in section 102.166(5), Florida Statutes, refers only to a counting error in the vote tabulation system. The opinion concludes that the inability of a voting system to read an "improperly marked marksense or improperly punched punchcard ballot" is not an "error in the voter tabulation system" and would not, therefore, trigger a recount of all ballots.

The division's opinion is wrong in several respects.

The opinion ignores the plain language of the statute which refers not to an error in the vote tabulation system but to an error in the vote tabulation. The Legislature has used the

2. *See*, § 102.166(4)(d), Fla. Stat., stating that the person requesting the recount "shall choose three precincts to be recounted."

terms "vote tabulation system" and "automatic tabulating equipment" elsewhere in section 102.166, Florida Statutes, when it intended to refer to the system rather than the vote count. Yet the division, by reading "vote tabulation" and "vote tabulation system" as synonymous, blurs the distinctions that the Legislature clearly delineated in section 102.166.[3]

The error in vote tabulation might be caused by a mechanical malfunction in the operation of the vote counting system, but the error might also result from the failure of a properly functioning mechanical system to discern the choices of the voters as revealed by the ballots. The fact that both possibilities are contemplated is evidenced by section 102.166(7) and (8), Florida Statutes. While subsection (8) addresses verification of tabulation software, subsection (7) provides procedures for an examination of the ballot by the canvassing board and counting teams to determine the voter's intent.

The division's opinion, without authority or support, effectively nullifies the language of section 102.166(7), Florida Statutes. Nothing in subsection (7) limits its application to the recount of all ballots. Rather, the procedures for a manual recount in subsection (7) equally apply to the initial sampling manual recount authorized in section 102.166(4)(d). Section 102.166(7)(b) states:

3. *See, e.g., Department of Professional Regulation, Board of Medical Examiners v. Durrani*, 455 So. 2d 515 (Fla. 1st DCA 1984) (legislative use of different terms in different portions of same statute is strong evidence that different meanings were intended).

> If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

Yet under the division's interpretation, such language is rendered superfluous. It is fundamental principle of statutory construction that statutory language is not to be assumed to be surplusage; rather a statute is to be construed to give meaning to all words and phrases contained within statute.[4]

Section 102.166(7) clearly recognizes that an examination by a person of the ballot will occur to determine whether the voter complied with the statutory requirement, *i.e.*, marked the marksense or punched the punchcard ballot. The statutes do not specify how a punchcard must be punched. Clearly, there may be instances where a punchcard or marksense ballot was not punched or marked in a manner in which the electronic or electromechanical equipment was able to read the ballot. Such a deficiency in the equipment in no way compromises the voter's intent or the canvassing board's ability to review the ballot and determine the voter's intent. In fact, section 101.5614(5) and (6), Florida Statutes, contemplate that such an examination will occur. Section 101.5614(6) provides that the ballot will not be counted if it is impossible to determine the elector's choice or the elector

4. *See, Terrinoni v. Westward Ho!*, 418 So. 2d 1143 (Fla. 1st DCA 1982); *Pinellas County v. Woolley*, 189 So. 2d 217 (Fla. 2d DCA 1966); Ops. Att'y Gen. Fla. 95-27 (1995); 91-16 (1991) (operative language in a statute may not be regarded as surplusage); 91-11 (statute must be construed so as to give meaning to all words and phrases contained within that statute).

marks more than one name than there are persons to be elected.

Clearly, the manual count of the sampling precincts which reveals a discrepancy between votes counted by the automatic tabulating equipment and valid ballots which were not properly read by the equipment but which constitute ballots in which the voter complied with the statutory requirements and in which the voter's intent may be ascertained, constitutes an "error in vote tabulation." If the error is sufficient that it could affect the outcome of the election, then a manual recount of all ballots may be ordered by the county canvassing board.

The division's opinion fails to acknowledge the longstanding case law in Florida which has held that the intent of the voters as shown by their ballots should be given effect. Where a ballot is marked so as to plainly indicate the voter's choice and intent, it should be counted as marked unless some positive provision of law would be violated.[5]

As the state has moved toward electronic voting, nothing in this evolution has diminished the standards first articulated in such decisions as *State ex rel. Smith v. Anderson*[6] and

5. *See, State ex rel. Smith v. Anderson*, 8 So. 1 (Fla. 1890); *Darby v. State*, 75 So. 411 (Fla. 1917); *State ex rel. Nuccio v. Williams*, 120 So. 310 (Fla. 1929) (in performing their duty of counting, tabulating, and making due return of ballots cast in an election, the inspectors may, in some cases of ambiguity or apparent uncertainty in the name voted for, determine, from the fact of the ballot as cast, the person for whom a vote was intended by the voter).

6. 8 So. 1 (Fla. 1890).

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State ex rel. Nuccio v. Williams[7] that the intent of the voter is of paramount concern and should be given effect if the voter has complied with the statutory requirement and that intent may be determined. For example, if a voter has clearly, physically penetrated a punchcard ballot, the canvassing board has the authority to determine that the voter's intention is clearly expressed even though such puncture is not sufficient to be read by automatic tabulating equipment.

In *State ex rel. Carpenter v. Barber*,[8] the Court stated:

> The intention of the voter should be ascertained from a study of the ballot and the vote counted, if the will and intention of the voter can be determined, even though the cross mark 'X' appears before or after the name of said candidate. *See Wiggins, Co. Judge v. State ex rel. Drane*, 106 Fla. 793, 144 So. 62; *Nuccio v. Williams*, 97 Fla. 159, 120 So. 310; *State ex rel. Knott v. Haskell*, 72 Fla. 176, 72 So. 651.

The Florida Statutes contemplate that where electronic or electromechanical voting systems are used, no vote is to be declared invalid or void if there is a clear indication of the intent of the voter as determined by the county canvassing board.[9]

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7. 120 So. 310 (Fla. 1929).

8. 198 So. 49, 51 (Fla. 1940).

9. *See, Wiggins v. State ex rel. Drane*, 144 So. 62, 63 (Fla. 1932) (separate tabulation and return of what may be deemed regular (Cont'd)

Appendix B

In light of the plain language of section 102.166(5), Florida Statutes, authorizing a manual recount of all ballots when the sampling manual recount indicates an error in vote tabulation which could affect the outcome of the election and the general principles of election law, I must express my disagreement with the conclusions reached in Division of Election Opinion 00-11. Rather I am of the opinion that the term "error in voter tabulation" encompasses a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4), Florida Statutes.

Sincerely,

s/ Robert A. Butterworth
Robert A. Butterworth
Attorney General

RAB/t

(Cont'd)
ballots does not mean that only regular ballots are to be counted; if the marking of the ballot should be irregular, but the voter casting such ballot has clearly indicated by an X-mark the candidate of his choice, the ballot should be counted as intended).

Appendix B

MEMORANDUM

To: Supervisor of Elections
Dade County
Palm Beach County
Broward County

From: Clay Roberts
Director
Division of Elections

Re: Amended certification of returns

Date: November 14, 2000

As of 5 p.m. today, the Division of Elections has received certification of returns from all 67 Florida counties. The usual practice of the state elections canvassing commission is to finally certify these returns as soon as the compilations are completed by the staff of the division. However, we understand your county may plan to conduct a manual recount continuing beyond today's 5 p.m. deadline.

Leon County Circuit Court Judge Terry Lewis confirmed today that the Secretary of State has the discretion to consider any request to amend certification of returns after the deadline. In order to properly exercise that discretion, the Secretary requires that you forward to her by 2 p.m. Wednesday, November 15, 2000 a written statement of the facts and circumstances that cause you to believe that a change should be made to what otherwise would be the final certification of the statewide vote, composed of the tallies received by 5 p.m. today, plus the total of the votes received from overseas ballots received by the counties by midnight on Friday.

APPENDIX C — FLORIDA SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT TO COMMITTEE SUBSTITUTE FOR SENATE BILL 499 (1989)

BILL NO. CS/SB 499

DATE: April 13, 1989

STATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

STAFF DIRECTOR	REFERENCE	ACTION
Stephens	1. EE	Fav/CS
	2. GO	
	3. AP	

SUBJECT:

Elections/Voting Equipment
and Systems

BILL NO. AND SPONSOR:

CS/SB 499 by Committee on Ethics & Elections and Senators Stuart, W.D. Childers, Johnson, Gardner and Brown

I. SUMMARY:

A. Present Situation:

The Electronic Voting Systems Act is comprised of sections 101.5601 through 101.5615, F.S., which

contain the majority of the Election Code provisions relating to electronic voting. The purpose of these sections is to authorize the use of electronic and electromechanical voting systems. They provide definitions; require the Department of State (DOS) to examine and approve voting systems; authorize DOS to prescribe rules to maintain correctness, impartiality and efficiency in voting procedures and to establish minimum security guidelines; specify certain voting procedures and ballot requirements; provide for inspection of ballots by an election board; call for instructions to be given to voters; require testing of tabulating equipment and examination of equipment during voting; describe the process for canvass of returns; and provide for recounts.

Section 101.5604, F.S., provides that the board of county commissioners of any county may obtain and use electronic or electromechanical voting systems approved by DOS. Section 101.5605, F.S., requires DOS to examine all electronic or electromechanical voting systems submitted to it and determine whether or not they comply with requirements of § 101.5606, F.S. Section 101.5606, F.S., requires such voting systems to be constructed so that voting will be in secrecy; each person may vote for or against persons and offices to which he is entitled to vote; the equipment will reject extra votes exceeding that allowed; it is capable of correctly counting votes; there is a method for write-in voting; it is capable of tallying votes; it is capable of automatically producing precinct totals in printed, marked or

punched form; and it will permit a voter to change his vote before registering the vote.

Section 101.5607, F.S., states that each supervisor of elections using an electronic or electromechanical voting system is required to establish written procedures to assure accuracy and security of the voting procedures in his county and submit them to DOS for review and approval. Section 101.5612, F.S., requires that the supervisor of elections test the automatic tabulating equipment within 10 days of the election to ascertain that the equipment will correctly count the votes cast. Section 101.5613, F.S., requires a member of the election board to occasionally examine the face of the voting device during voting to determine that it has not been damaged or tampered with. Chapter 1C-7.015, F.A.C., establishes minimum security procedures for electronic or electromechanical voting systems.

Recent media articles have focused attention on security of electronic voting systems. With over half of the votes in the nation being counted electronically, the accuracy of electronic voting systems is paramount. The questions most often asked are "Do computerized systems count accurately? Are they vulnerable to fraud?" A November 7, 1988, article entitled "Annals of Democracy" in the *New Yorker* stated that errors and accidents in computerized elections have occurred across the country and have increased in recent years. An incident of mechanical problems with an

electronic voting system occurred in Bradenton, Florida where a seventh of the county's precincts had to be counted twice in one election since the ballots were soggy, became warped and were mangled by the voting equipment. Also, an apparent software "glitch" or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.

Other horror stories related to electronic voting systems have been reported in the media, but in testimony before the Joint Committee on Information Technology Resources in 1989, supervisors of elections pointed out that there can be problems with any kind of voting system. However, many local election officials would agree that state certification procedures and local logic-and-accuracy tests provide a reasonable assurance that "electronic" elections are honestly counted. It is generally agreed that additional steps which could be taken in Florida to improve security procedures, while not hampering the already cumbersome elections process, would enhance the public's confidence in our voting system.

Forty-one counties in Florida utilize computerized voting systems. A report entitled *THE STATE'S INFORMATION POLICY: Response to Changes in an Electronic Age*, dated March, 1989, written by the Florida Legislature Joint Committee on Information Technology Resources, addressed the security of electronic voting systems in the state and made a number of recommendations. Some of these recommendations are embodied in SB 499.

DOS currently employs one person, full-time, to examine and certify electronic and electromechanical voting systems for use in the state.

B. Effect of Proposed Changes:

Section 1. The act is called the "Voter Protection Act."

Section 2. The Secretary of State is responsible for providing technical assistance to the supervisors of elections on voting systems.

Section 3. "Voting system" is defined as a method of casting and processing votes that functions wholly or partly by use of mechanical, electromechanical, or electronic apparatus or by use of paper ballots and includes, but is not limited to, the procedures for casting and processing votes and the programs, operating manuals, tabulating cards, printouts, and other software necessary for the system's operation.

Section 4. Section 101.015 is created. DOS is directed to adopt rules which establish minimum standards for hardware and software for voting systems. Such rules shall contain standards for functional requirements, performance levels, physical and design characteristics, documentation requirements, and evaluation criteria. Every other year DOS shall review the rules to determine their adequacy and effectiveness in assuring that elections are fair and impartial. DOS is also authorized to adopt rules to achieve and maintain the maximum degree

of correctness, impartiality, and efficiency of the procedures of voting, and rules to establish minimum security standards for voting systems. Supervisors of elections must establish written procedures to assure accuracy and security in their counties, which will be reviewed every other year by DOS. Supervisors shall submit any revisions to their security procedures to DOS before they take effect. All voting systems purchased on or after January 1, 1990, must meet the minimum standards established by this section and subsequent rules. All voting systems in use on or after July 1, 1993, must meet the minimum standards.

Section 5. The term "voting equipment" in § 101.292, F.S., is redefined to include ballot cards.

Section 6. DOS would need to review all purchase contracts for voting equipment. DOS may, with the assistance of the Department of General Services, negotiate and execute purchasing agreements and contracts under which any governing body may purchase any element of a voting system.

Section 7. Counties and municipalities are authorized to provide for experimental use of any voting system, rather than voting machine.

Section 8. "Software" is defined as the programs and routines used to employ and control the capabilities of data processing hardware, including, without limitation, operating systems, compilers, assemblers,

utilities, library routines, maintenance routines, applications, and computer networking programs.

Section 9. Voting systems submitted to DOS for testing shall have the software required for the system's operation tested.

Section 10. No electronic or electromechanical voting system shall be approved by DOS unless it is capable of providing records from which the operation of the voting system may be audited.

Section 11. Copies of the program codes and user and operator manuals and copies of all software and other pertinent information required by DOS relating to an approved electronic or electromechanical voting system must be filed with DOS by the supervisor of elections at the time of purchase or implementation. Any such information or materials not on file with DOS may not be used in an election. The supervisor of elections shall send, by certified mail, to DOS, a copy of the tabulation program which was used in any logic and accuracy testing of tabulating equipment, within 24 hours following such test. DOS has the authority to review the voting system of any county to ensure compliance with the Electronic Voting Systems Act. Software on file with DOS which is obtained from an agency under a licensing agreement which prohibits its disclosure and which software is a trade secret, and agency-produced data processing software which is sensitive is exempt from open public record requirements.

Appendix C

DOS may develop software for use with an electronic or electromechanical voting system. Such software developed by DOS is an open public record.

Section 12. DOS is required to adopt rules prescribing standards for ballots used in electronic or electromechanical voting systems. Such standards shall ensure that ballots are counted in a uniform and consistent manner and shall include, without limitation, standards for the physical characteristics of ballots, physical characteristics of ink for ballots, and printing and scoring of ballots.

Section 13. In recounting ballots, one method would be the use of the automatic tabulating equipment.

Section 14. Section 101.591, F.S., is created to require DOS to audit, at least every five years, the voting system in each county. After completion, a copy of the audit is to be furnished to the supervisor of elections and the board of county commissioners. The audit shall consist of a study and evaluation of the voting system used during any election to provide reasonable assurance that the system is properly controlled, can accurately count votes, provides adequate safeguards against unauthorized manipulation and fraud, and complies with the requirements of law and rules of DOS.

Section 15. Updated procedures are provided for the canvassing board to verify election returns in the event that a protest of election returns is filed. Any

Appendix C

candidate whose name appeared on the ballot, any political committee supporting or opposing an issue on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. Such request must be filed with the canvassing board prior to the time the canvassing board adjourns or within 5 days after midnight of the date the election was held, whichever is later. The county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make a reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount. The manual recount must include at least three precincts and at least one percent of the total votes cast for such candidate or issue. The person who requested the recount shall choose three precincts to be recounted, and the county canvassing board may choose additional precincts to be recounted. In the event that the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall recount the remaining precincts with the vote tabulation system, request DOS to verify the tabulation software, or manually recount all ballots. Any manual recount shall be open to the public.

The procedures for a manual recount are: the county canvassing board shall appoint counting teams, each consisting of two electors. Preferably, these two people would represent two different political parties.

If the team of counters cannot determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for a determination. In the event that a county canvassing board determines the need to verify the tabulation software, the board shall make such request in writing to DOS. When DOS verifies such software, DOS shall compare the software used to tabulate the votes with the software on file with DOS and check the election parameters. DOS is required to respond to the county canvassing board within three working days.

Section 16. A Bureau of Voting Systems Certification within the Division of Elections of DOS is created. This Bureau would provide technical support to supervisors of elections and be responsible for voting system standards and certification. Sixteen initial positions are established in the Bureau and $669,000 is appropriated to the Division of Elections from the General Revenue Fund.

Section 17. Sections 1-15 take effect January 1, 1990. Sections 16 and 17 take effect July 1, 1989, or upon becoming a law, whichever occurs later.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

None.

B. Government:

A Bureau of Voting Systems Certification within the Division of Elections of DOS is created. Sixteen initial positions are established in the Bureau, and the sum of $669,000 is appropriated to the Division of Elections from the General Revenue Fund for fiscal year 1989-90.

Local governments may experience reduced costs for acquiring voting systems, based upon the Department of State negotiating volume purchasing agreements. Local governments could realize a savings if the DOS develops software for use by the counties, at the cost of duplication. Department of General Services would be able to assist DOS in voting system purchase contracts without additional resources.

III. COMMENTS:

1. The companion bill is HB 1529.

2. An early draft of this bill, before it was filed, financed the new Bureau of Voting Systems Certification with an election security assessment paid at the time of qualifying, which was 2% of the annual salary of the office sought. Another funding alternative would be a combination of general revenue funding and a smaller election security assessment.

IV. AMENDMENTS:

None.

Appendix C

STATEMENT OF SUBSTANTIAL CHANGES
CONTAINED IN COMMITTEE SUBSTITUTE FOR
Senate Bill 499

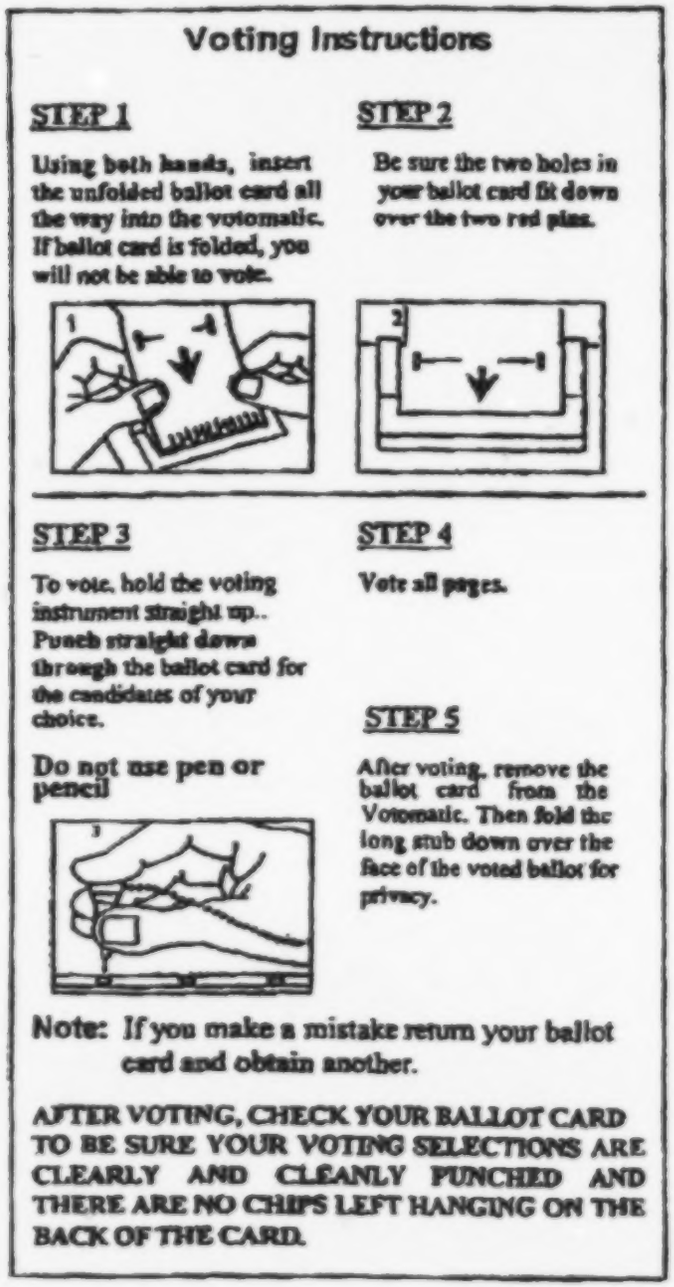
Using automatic tabulating equipment would be one method of recounting ballots. When ballot recounting was authorized, the county canvassing board would be required to make a reasonable effort to notify each candidate whose race was being recounted. As many counting teams as necessary could be appointed.

Committee on Ethics & Elections

s/ [illegible]
Staff Director

(FILE THREE COPIES WITH THE SECRETARY OF THE SENATE)

APPENDIX D — PALM BEACH COUNTY, FLORIDA, VOTING INSTRUCTIONS FOR THE NOVEMBER 7, 2000, GENERAL ELECTION



APPENDIX E — LETTER FROM SECRETARY OF STATE HARRIS TO PALM BEACH COUNTY CANVASSING COMMISSION, DATED NOVEMBER 15, 2000

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State
The Capitol
Tallahassee, Florida 32399-0250
(850) 414-5500
http://www.dos.state.fl.us

November 15, 2000

Honorable Charles Burton
County Court Judge
Chair, Palm Beach County Canvassing Commission
Palm Beach County Courthouse
West Palm Beach, Florida 33401

RE: Request of Palm Beach County Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Chairman Burton:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Palm Beach County Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in §102.112, Florida Statutes. As the Board is aware, §102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day

following the general election. Also, §102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000. I also am in receipt of your report filed with the Division of Elections.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion. There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. *In Re Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists

Appendix E

as to whether the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. *McDermott, et al. v. Harris*, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected."

Appendix E

Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Facts and Circumstances Alleged by Board

For Purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts and circumstances set forth in your letter of today's date and assumed that they are true. The Board has alleged that it conducted a machine recount and a limited manual recount of one percent of the total votes cast and that the two recounts produced "different results than the machine recount." The Board has alleged that "the machine recorded approximately 10,000 undervotes." And, the Board alleged that it has received conflicting opinions from the Division of Elections and the Attorney General regarding the proper interpretation of §102.166(5), Florida Statutes, and that the Board is seeking adjudication by the Florida Supreme Court to resolve the conflicting opinions on whether the Board may conduct a manual recount under the law. Finally, the Board alleged that the results of a manual recount could affect the outcome of the election. In its report filed with the Division of Elections, the Board responded in the negative to the question of whether the county "had any problems which occurred as a result of equipment malfunctions either at the precinct level or at a counting location." In this report, the Board also noted that it would provide additional details regarding "difficulties or unusual circumstances encountered by an election board or canvassing board," and "problems which the canvassing board feels should be made a part of the official election record."

Appendix E

Application of Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged the *possibility* that the results of the manual recount *could* affect the outcome of the election if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the *possibility* of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to §102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

s/ Katherine Harris
Katherine Harris
Secretary of State

APPENDIX F — LETTER FROM SECRETARY OF STATE HARRIS TO MIAMI-DADE COUNTY CANVASSING COMMISSION, DATED NOVEMBER 15, 2000

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State
The Capitol
Tallahassee, Florida 32399-0250
(850) 414-5500
http://www.dos.state.fl.us

November 15, 2000

Honorable Lawrence D. King
Chair, Miami-Dade Canvassing Board
Office of the Supervisor of Elections
Suite 1910
111 NW 1st Street
Miami, Florida 33128-1962

RE: Request of Miami-Dade Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Chairman King:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Miami-Dade Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in §102.112, Florida Statutes. As the Board is aware, §102.112, Florida

Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, §102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000. I am not in receipt of your report due to be filed with the Division of Elections.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion. There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. *In Re Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. *McDermott, et al. v. Harris*, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Facts and Circumstances Alleged by Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts and circumstances set forth in your letter of today's date and assumed that they are true. The Board has alleged that it conducted a limited manual recount of one percent of the total votes cast with respect to the Office of the President of the United States, completed at approximately 8:00 p.m. on November 14, 2000. The Board also has alleged that it has voted to conduct a manual recount of six precincts with respect to votes cast in the race for Congressional District 22, and that this recount was scheduled to begin this morning. The Board has alleged no facts or circumstances in support of the manual recounts.

Application of Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Miami-Dade County has been unable to comply

with its election duties due to an act of God, or other extenuating circumstances that are beyond its control.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to §102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

s/ Katherine Harris
Katherine Harris
Secretary of State

APPENDIX G — LETTER FROM SECRETARY OF STATE HARRIS TO BROWARD COUNTY CANVASSING COMMISSION, DATED NOVEMBER 15, 2000

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State
The Capitol
Tallahassee, Florida 32399-0250
(850) 414-5500
http://www.dos.state.fl.us

November 15, 2000

Honorable Robert W. Lee
County Court Judge
Chair, Broward County Canvassing Commission
201 SE 6th Street, Room 6760
Ft. Lauderdale, Florida 33301

RE: Request of Broward County Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Chairman Lee:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Broward County Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in §102.112, Florida Statutes. As the Board is aware, §102.112, Florida Statutes, requires the Board to file its county election

returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, §102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion. There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. *In Re Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists

as to whether the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. *McDermott, et al. v. Harris*, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Facts and Circumstances Alleged by Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts set forth in your report filed November 13, 2000, and your letter of today's date and assumed that they are true.

The Board states the following additional facts and circumstances that justify an amended certification:

1. Extremely large voter turnout, and the resulting ballots cast, dramatically increased the time required for the initial tabulation.

2. This Board, representing voters in the second largest county in Florida, needs additional time to complete all necessary tabulation, and should be afforded more time than boards representing voters in less-populated counties.

3. The large number of ballots has created additional logistical problems, requiring that ballots be moved to an alternate location for further tabulation. The Supervisor's location can accommodate a very limited number of counting teams.

4. The Board has encountered significant periods of delay, including:

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A. The actions of the Board have been materially impacted by numerous lawsuits, including lawsuits filed in state circuit courts in Broward County, Palm Beach County and Leon County, and in federal court in both the Southern District and Middle District of Florida.

B. The actions of the Board have been materially impacted by conflicting opinion letters issued by Cabinet officers. On November 13, 2000, an opinion letter was issued by the Director of the Division of Elections, on behalf of the Secretary of State. On November 14, 2000, a conflicting opinion letter was issued by the Office of the Attorney General. These opinion letters impacted the Board's decision-making process regarding a full manual recount and further impeded the Board's ability to proceed more expeditiously.

C. One of the members of the Board, Supervisor of Elections Jane Carroll, was out of state on a pre-planned family holiday and therefore unavailable from November 9, 2000 through November 12, 2000.

D. The Veterans' Day holiday, observed in Broward County by different governmental agencies on either November 10, 2000 or November 13, 2000, further limited the Board's ability to act.

E. The Board was required by state law to conduct an automatic recount prior to determining the necessity of a full manual recount.

Additionally, the Board, in its report filed with the Division of Elections on November 13, 2000, responded in the

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negative to the question of whether the county "had any problems which occurred as a result of equipment malfunctions either at the precinct level or at a counting location." In this report, the Board stated that "2 precincts failed to have ballots in transfer case; ballots retrieved from locked boxes left at precinct." And, the Board responded in the negative to the question of whether the board knew of "any other problems which the canvassing board feels should be made a part of the official election record."

Application of Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures. The Board has not alleged any facts or circumstances that suggest that Broward County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged large voter turnout and logistical problems associated with that turnout. However, Broward County is a large county and high voter turnout was not unexpected. The Board also has alleged delay in the certification process associated with litigation, a family holiday by the Supervisor of Elections, and the Veterans' Day holiday. However, I find that these circumstances, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

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For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to §102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

s/ Katherine Harris
Katherine Harris
Secretary of State

APPENDIX H — CERTIFICATION OF ELECTION RESULTS FROM THE NOVEMBER 7, 2000 GENERAL ELECTION

OFFICIAL CERTIFICATE OF THE STATE ELECTIONS CANVASSING COMMISSION OF THE GENERAL ELECTION HELD ON THE SEVENTH DAY OF NOVEMBER, A. D., 2000

We, BOB CRAWFORD, Commissioner of Agriculture, KATHERINE HARRIS, Secretary of State, and L. CLAYTON ROBERTS, Director, Division of Elections, constituting the State Elections Canvassing Commission, hereby certify the election returns of the general election returns of the general election held in the State of Florida on the Seventh day of November, A.D., 2000, as shown by the returns of said general election on file in the office of the Secretary of State from all the counties in Florida and herewith give below the results of said canvass:

For President of the United States, the whole number of votes cast was 5,958,643 of which number

George W. Bush and Dick Cheney (REP)	received	2,910,492 votes
Al Gore and Joe Lieberman (DEM)	received	2,910,192 votes
Harry Browne and Art Olivier (LIB)	received	16,401 votes
Ralph Nader and Winona LaDuke (GRE)	received	97,422 votes

Appendix H

James Harris and Margaret Trowe (SWP)	received	558 votes
John Hagelin and Nat Goldhaber (LAW)	received	2,273 votes
Pat Buchanan and Ezola Foster (REF)	received	17,472 votes
David McReynolds and Mary Cal Hollis (SPF)	received	618 votes
Howard Phillips and J. Curtis Frazier (CPF)	received	1,370 votes
Monica Moorehead and Gloria La Riva (WWP)	received	1,805 votes
May Chote and Miriam E. Lancaster (WRI)	received	34 votes
Ken. C. McCarthy and Frank Beifus (WRI)	received	6 votes

For United States Senator, the whole number of votes cast was 5,854,816 of which number

Bill McCollum (REP)	received	2,704,151 votes
Bill Nelson (DEM)	received	2,988,836 votes
Joe Simonetta (LAW)	received	26,075 votes
Joel Deckard (REF)	received	17,319 votes
Willie Logan (NPA)	received	80,819 votes
Andy Martin (NPA)	received	15,877 votes

Appendix H

Darrell L. McCormick (NPA)	received	21,652 votes
"Nikki O." (WRI)	received	29 votes
Olen C. Faulk (WRI)	received	8 votes
Richard Grayson (WRI)	received	36 votes
Brian Heady (WRI)	received	6 votes
Argiris Malapanis (WRI)	received	8 votes

For Member, House of Representatives, One Hundred and Seventeenth House District, the whole number of votes cast was 24,941 of which number

Carlos Lacasa (REP)	received	24,940 votes
Richard Cason (WRI)	received	1 votes

For Member, House of Representatives, One Hundred and Eighteenth House District, the whole number of votes cast was 27,819 of which number

Edward B. Bullard (DEM)	received	27,819 votes
Marie Yves Jose Avignon (WRI)	received	0 votes

For Member, House of Representatives, One Hundred and Nineteenth House District, the whole number of votes cast was 32,794 of which number

Tom David (REP)	received	16,047 votes
Cindy Lerner (DEM)	received	16,747 votes

Appendix H

For Member, House of Representatives, One Hundred and Twentieth House District, the whole number of votes cast was 37,925 of which number

Ken Sorensen (REP)	received	19,123 votes
Ron Herron (DEM)	received	18,802 votes

IN TESTIMONY WHEREOF, we have hereunto set our hands and official signatures this Fifteenth day of November, A. D., 2000

s/ Bob Crawford
COMMISSIONER OF
AGRICULTURE

s/ Katherine Harris
SECRETARY OF STATE

s/ L. Clayton Roberts
DIRECTOR, DIVISION OF
ELECTIONS

[SEAL]
OFFICIAL SEAL OF THE
STATE OF FLORIDA
IN GOD WE TRUST

APPENDIX I — PRESS RELEASE ISSUED BY SECRETARY OF STATE HARRIS, DATED NOVEMBER 15, 2000

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State
The Capitol
Tallahassee, Florida 32399-0250
(850) 414-5500
http://www.dos.state.fl.us

For Immediate Release
November 15, 2000

Contact: Ben McKay
(850) 414-5502

A Statement from the Secretary of State

Good evening.

On Tuesday, I requested those counties contemplating manual vote recounts to submit a written statement to me of the facts and circumstances justifying any belief on their part that they should be allowed to amend the certified returns previously filed by them in accordance with law.

All three counties — Palm Beach, Miami-Dade, and Broward — responded by the 2pm deadline today. Copies of their responses have already been distributed. Additionally, Collier County asked about the possibility of an amendment to their return unrelated to manual recounting. A copy of that letter has been distributed as well.

For the past week, I have devoted a substantial amount of my time to the issues surrounding manual vote recounts.

Appendix I

After Judge Lewis' decision of yesterday morning, my staff and I, together with counsel, developed criteria appropriate to the exercise of my discretion under Florida law. This criteria is clearly set forth in Florida case law.

For the past six hours, I have applied these criteria in deliberating upon the specific requests of the counties contemplating manual vote recounts. As a result of these deliberations, I have decided it is my duty, under Florida law, to exercise my discretion in denying the requested amendments. The reasons given in their requests are insufficient to warrant waiver of the unambiguous filing deadline imposed by the Florida Legislature.

I have communicated this decision to these counties in letters detailing the criteria I used in making my judgments, and the application of these criteria to the stated circumstances. Copies of these letters are available.

Because it is my determination that no amendments to the official returns now on file at the Department of State are warranted, the State Elections Canvassing Commission, acting in its normal and usual manner, has certified the results of last Tuesday's election in Florida, including the Presidential election. Copies of that portion of the certification relating to the presidential election, and the signature page of the certification, are also available.

As I have previously indicated, I expect that, after receipt, tabulation, and certification of the overseas absentee ballots by the counties, the state Elections Canvassing Commission will finally certify the Presidential election in Florida on Saturday.

Appendix I

This schedule, of course, is subject to judicial intervention. In that context, I once again will be unable, personally, to answer questions. However, I have with me our General Counsel, Debby Kearney, and two of our outside counsel, Joe Klock and Donna Blanton, and have asked them to remain behind to answer appropriate questions from you.

One final comment. I want to reassure the public that my decisions in this process have been made carefully, consistently, independently, and, I believe, correctly.

I am very grateful for your patience, and your understanding.

Thank you, and God bless.

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

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REPLY BRIEF FOR PETITIONER

The brief in opposition filed by the Florida Democratic Party (the "FDP") is long on rhetoric, but it contains no effective response to petitioner's compelling showing that certiorari is warranted in this case.

I. This Court's Immediate Review Of The Federal Questions Squarely Presented In This Case Is Necessary And Appropriate

The FDP cannot and does not dispute that the exceedingly important nature of this case provides a powerful justification for review by this Court. Opp. 3. Indeed, even the courts below emphasized the unique importance and significance of this proceeding, characterizing the case as one of "great public importance requiring immediate resolution" and "extraordinary importance." Pet. App. 2a, 37a. Nonetheless, the FDP asserts (Opp. 2-3, 14-15) that principles of federalism and public policy militate against review. The FDP's assertions are without merit.

The FDP's repeated reliance on principles of "federalism" is particularly misplaced. This Court has repeatedly recognized the powerful federal interest in the selection of presidential electors. In *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983), for example, the Court held that "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." Thus, the federal Constitution and congressional enactments make clear that state laws regarding the appointment of presidential electors are a matter of *federal* concern. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 2; 3 U.S.C. § 5. These provisions directly refute the FDP's erroneous assertion that petitioner is "attempt[ing] to federalize a state law dispute." Opp. 15. Indeed, the Constitution and federal statutes have already "federalized" numerous matters relating to the appointment of presidential electors, including those at issue here. *See, e.g.*, 3 U.S.C. §§ 1-15; *Anderson*, 460 U.S. 780 (1983); *Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976) ("Th[is] Court has also recognized broad congressional power to legislate in connection with the elections of the President and Vice President."); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *Burroughs v. United States*, 290 U.S. 534, 544-48 (1934); *see id.* at 547 ("The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress."); *see also Ex parte Yarbrough*, 110 U.S. 651 (1884).

Title 3, § 5 of the United States Code plainly recognizes a federal interest in the manner in which States resolve "controvers[ies] or contest[s] concerning the appointment of" presidential electors. This statute requires States to resolve any disputes over the appointment of electors by exclusive reference to state laws "enacted prior to" election day. 3 U.S.C. § 5. The decision of the Supreme Court of Florida violates this federal mandate because it attempts to promulgate a new rule of law to govern the present controversy over the appointment of Florida's electors. As a result, and pursuant to *federal* law, the decision below is a nullity with respect to the November 7, 2000, presidential election. No principle of federalism or comity precludes this Court from granting certiorari in order to enforce that federal statutory mandate in this case.[1]

---

[1] The FDP errs in suggesting (Opp. 3 n.1) that petitioner's federal claims were not properly preserved below. The appendix to the petition reproduces the relevant excerpts from petitioner's brief below (Pet. App. 62a-64a), in which petitioner clearly and expressly raised the federal questions at issue here. *See also* Pet. 9. The FDP's suggestion that petitioner was obligated to raise these claims in the trial court is mistaken. Under Florida law, petitioner was entitled to defend the judgment on any ground supported in

[Footnote continued on next page]

Thus, the FDP is simply wrong in suggesting (Opp. 2) that the States possess "plenary and exclusive power" over all aspects of the selection of presidential electors. Indeed, this Court rejected that very argument in *Williams v. Rhodes*: "The State also contends that it has absolute power to put any burdens it pleases on the selection of electors because of the First Section of the Second Article of the Constitution .... But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas: these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." 393 U.S.at 28-29. The FDP's attempt to immunize the decision below from review is baseless.

Equally without merit is the FDP's suggestion (Opp. 15 & n.4) that this Court's enforcement of 3 U.S.C. § 5 in this case would violate the Tenth Amendment. Indeed, the very cases relied upon by the FDP expressly reject the argument advanced by the FDP in its brief, and instead reaffirm the self-evident proposition that the Tenth Amendment does not limit the power of federal courts to compel state and local officials to comply with

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[Footnote continued from previous page]
the record. *See Firestone v. Firestone*, 263 So. 2d 223, 225 (Fla. 1972) (where district court holding was based on erroneous findings, "the judgment may yet be affirmed where appellate review discloses other theories to support it"); *Kirby v. State*, 765 So. 2d 723, 725 n.3 (Fla. Dist. Ct. App. 1999) ("As appellee, it is open to the state to argue for affirmance on any ground the record will support."). Moreover, because the violation of federal law at issue here *resulted* from the decision of the state supreme court, petitioner had no obligation to raise that federal law claim in an anticipatory manner in the trial court. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

federal law. *Printz v. United States*, 521 U.S. 898, 931 n.16 (1997); *New York v. United States*, 505 U.S. 144, 179 (1992) ("the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply").

II. Review Is Warranted In This Case Because The Florida Supreme Court Disregarded Federal Law As Enunciated In The Due Process Clause And 3 U.S.C. § 5

Contrary to the FDP's assertions (Opp. 2, 15, 17-18), this case involves much more than a "state law dispute," and instead involves substantial violations of due process and 3 U.S.C. § 5. The FDP's argument rests on the baseless assumption that this Court is absolutely precluded from applying federal law standards to weigh the validity of state court decisions purporting to apply state law.

The federal courts are frequently required to examine state law in determining whether a federal statutory or constitutional provision has been violated, and in such cases the federal courts are not bound by the state courts' characterizations of the federal issue. For example, in applying the Ex Post Facto Clause, this Court has held that the question whether state law has changed in a manner that impermissibly increases the penalties for past conduct is a question of *federal*, not state, law, even though resolution of that question requires a comparative analysis of state law. *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("[W]hether the [state-law] standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself."). The question whether a State is attempting to resolve controversies over the appointment of electors by reference to "laws enacted prior to the day fixed for the appoint-

ment," or is instead attempting to impose new rules of law retroactively in violation of 3 U.S.C. § 5, is also ultimately a question of federal law.

The FDP appears to contend (Opp. 17) that because the state supreme court's decision discusses Florida laws that existed prior to election day, the court's decision could not have violated 3 U.S.C. § 5. That contention is meritless. Nothing in Florida law prior to November 7 revealed that the seven-day period for certification of election results was in reality a 19-day period, or that the Secretary of State's broad power to enforce the statutory deadline and reject untimely election returns was instead almost nonexistent. Whatever the merit of the Florida Supreme Court's interpretation as a matter of state law, it is clear that *for purposes of federal law* the decision below announces a new and previously nonexistent legal standard applicable to disputes over the appointment of presidential electors.[2]

Even the FDP does not dispute that a change in the law took place. It simply claims that the Florida Supreme Court's decision does not "'change the rules' *in any way that implicates federal law*." Opp. 17 (emphasis added). Under 3 U.S.C. § 5, however, *any* post-election change in the rules governing the appointment of presidential electors implicates—and violates—federal law.

The FDP also errs in contending that so long as the retroactive change in the law was judicially, as opposed

---

[2] The FDP asserts that the 5:00 p.m., November 14 deadline was "set by the Secretary of State." Opp. 9. That deadline, however, was established by the Florida Legislature in §§ 102.111 and 102.112 of the Florida Statutes. The only deadline "set" by a body other than the legislature in this matter is the arbitrary 5:00 p.m., November 26 deadline that the Florida Supreme Court chose to establish in its decision below.

to legislatively, imposed, 3 U.S.C. § 5 is satisfied. *See* Opp. 16. The FDP argues in effect that the Florida Legislature granted to the state courts the authority to determine the proper way in which to resolve controversies concerning the appointment of Florida's presidential electors. Under the FDP's theory, no violation of 3 U.S.C. § 5 would occur even if the judicial tribunal deviates from the law as it was established prior to the election, so long as the legislature had granted the courts jurisdiction to resolve such controversies. This argument is without merit. To begin with, such an interpretation of 3 U.S.C. § 5 would render it a virtual nullity. If state legislatures could simply convey authority to a chosen tribunal to create new rules to govern disputes over the appointment of electors, States could easily avoid the limitations placed on them by 3 U.S.C. § 5.

Such a self-defeating construction is also at odds with its legislative history. As Representative Cooper explained in the congressional debate on this statute, "these contests should be decided under and by virtue of laws made prior to the exigency under which they arose." 18 CONG. REC. 47 (1886) (remarks of Rep. Cooper). The clear purpose of 3 U.S.C. § 5 is to prevent States from manipulating their laws after the initial election results are known, regardless of which branch of government is responsible for that change. Indeed, by requiring that the rules governing election disputes be established by "enact[ment]" prior to the election, Congress made clear that state *legislatures*, not the courts, were to establish these rules of law. That approach is entirely in keeping with Congress's desire to avoid retroactive changes that could affect the results of elections. To interpret 3 U.S.C. § 5 in the contrary manner suggested by the FDP would render its protections essentially meaningless.

III. Review Is Warranted Because The Supreme Court of Florida's Decision Is In Contravention of Article II Of The Constitution

As discussed in the petition, Article II of the Constitution reserves to the state *legislatures*, not the state *courts*, the authority to determine the manner in which to appoint presidential electors. *See* U.S. CONST. art. II, § 1, cl. 2. The FDP asserts that because this provision delegates authority to the States, disputes over the appointment of electors must rest exclusively on state law, and thus are not subject to federal court review. *See* Opp. 18. While it is true that the appointment of presidential electors in each State will turn on the laws of the individual States, the suggestion that federal courts have no role in this area is demonstrably incorrect. Where a State's judiciary intrudes upon this constitutional grant of authority to the State legislature by eviscerating a state statutory rule applicable to electoral disputes, federal court review is plainly appropriate. *See McPherson v. Blacker*, 146 U.S. 1, 25-26 (1892) ("the words 'in such manner as the Legislature thereof may direct' . . . operat[e] as a limitation upon the State in respect of *any* attempt to circumscribe the legislative power") (emphasis added).[3]

[3] For all the reasons set forth in petitioner's reply brief in case number 00-837, the FDP's arguments regarding petitioner's federal constitutional claims under the Equal Protection Clause, the Due Process Clause, and the First Amendment are equally without merit, and this Court's review of those claims is warranted.

CONCLUSION

As this Court recognized in *Burroughs v. United States*, 290 U.S. 534, 545 (1934), "[t]he President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

For all the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 24, 2000

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Equally without merit is the FDP's suggestion (Opp. 15 & n.4) that this Court's enforcement of 3 U.S.C. § 5 in this case would violate the Tenth Amendment. Indeed, the very cases relied upon by the FDP expressly reject the argument advanced by the FDP in its brief, and instead reaffirm the self-evident proposition that the Tenth Amendment does not limit the power of federal courts to compel state and local officials to comply with

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[Footnote continued from previous page]

the record. *See Firestone v. Firestone*, 263 So. 2d 223, 225 (Fla. 1972) (where district court holding was based on erroneous findings, "the judgment may yet be affirmed where appellate review discloses other theories to support it"); *Kirby v. State*, 765 So. 2d 723, 725 n.3 (Fla. Dist. Ct. App. 1999) ("As appellee, it is open to the state to argue for affirmance on any ground the record will support."). Moreover, because the violation of federal law at issue here *resulted* from the decision of the state supreme court, petitioner had no obligation to raise that federal law claim in an anticipatory manner in the trial court. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

federal law. *Printz v. United States*, 521 U.S. 898, 931 n.16 (1997); *New York v. United States*, 505 U.S. 144, 179 (1992) ("the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply").

II. Review Is Warranted In This Case Because The Florida Supreme Court Disregarded Federal Law As Enunciated In The Due Process Clause And 3 U.S.C. § 5

Contrary to the FDP's assertions (Opp. 2, 15, 17-18), this case involves much more than a "state law dispute," and instead involves substantial violations of due process and 3 U.S.C. § 5. The FDP's argument rests on the baseless assumption that this Court is absolutely precluded from applying federal law standards to weigh the validity of state court decisions purporting to apply state law.

The federal courts are frequently required to examine state law in determining whether a federal statutory or constitutional provision has been violated, and in such cases the federal courts are not bound by the state courts' characterizations of the federal issue. For example, in applying the Ex Post Facto Clause, this Court has held that the question whether state law has changed in a manner that impermissibly increases the penalties for past conduct is a question of *federal*, not state, law, even though resolution of that question requires a comparative analysis of state law. *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("[W]hether the [state-law] standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself."). The question whether a State is attempting to resolve controversies over the appointment of electors by reference to "laws enacted prior to the day fixed for the appointment," or is instead attempting to impose new rules of law retroactively in violation of 3 U.S.C. § 5, is also ultimately a question of federal law.

The FDP appears to contend (Opp. 17) that because the state supreme court's decision discusses Florida laws that existed prior to election day, the court's decision could not have violated 3 U.S.C. § 5. That contention is meritless. Nothing in Florida law prior to November 7 revealed that the seven-day period for certification of election results was in reality a 19-day period, or that the Secretary of State's broad power to enforce the statutory deadline and reject untimely election returns was instead almost nonexistent. Whatever the merit of the Florida Supreme Court's interpretation as a matter of state law, it is clear that *for purposes of federal law* the decision below announces a new and previously nonexistent legal standard applicable to disputes over the appointment of presidential electors.[2]

Even the FDP does not dispute that a change in the law took place. It simply claims that the Florida Supreme Court's decision does not "'change the rules' *in any way that implicates federal law*." Opp. 17 (emphasis added). Under 3 U.S.C. § 5, however, *any* post-election change in the rules governing the appointment of presidential electors implicates—and violates—federal law.

The FDP also errs in contending that so long as the retroactive change in the law was judicially, as opposed

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[2] The FDP asserts that the 5:00 p.m., November 14 deadline was "set by the Secretary of State." Opp. 9. That deadline, however, was established by the Florida Legislature in §§ 102.111 and 102.112 of the Florida Statutes. The only deadline "set" by a body other than the legislature in this matter is the arbitrary 5:00 p.m., November 26 deadline that the Florida Supreme Court chose to establish in its decision below.

to legislatively, imposed, 3 U.S.C. § 5 is satisfied. *See* Opp. 16. The FDP argues in effect that the Florida Legislature granted to the state courts the authority to determine the proper way in which to resolve controversies concerning the appointment of Florida's presidential electors. Under the FDP's theory, no violation of 3 U.S.C. § 5 would occur even if the judicial tribunal deviates from the law as it was established prior to the election, so long as the legislature had granted the courts jurisdiction to resolve such controversies. This argument is without merit. To begin with, such an interpretation of 3 U.S.C. § 5 would render it a virtual nullity. If state legislatures could simply convey authority to a chosen tribunal to create new rules to govern disputes over the appointment of electors, States could easily avoid the limitations placed on them by 3 U.S.C. § 5.

Such a self-defeating construction is also at odds with its legislative history. As Representative Cooper explained in the congressional debate on this statute, "these contests should be decided under and by virtue of laws made prior to the exigency under which they arose." 18 CONG. REC. 47 (1886) (remarks of Rep. Cooper). The clear purpose of 3 U.S.C. § 5 is to prevent States from manipulating their laws after the initial election results are known, regardless of which branch of government is responsible for that change. Indeed, by requiring that the rules governing election disputes be established by "enact[ment]" prior to the election, Congress made clear that state *legislatures*, not the courts, were to establish these rules of law. That approach is entirely in keeping with Congress's desire to avoid retroactive changes that could affect the results of elections. To interpret 3 U.S.C. § 5 in the contrary manner suggested by the FDP would render its protections essentially meaningless.

III. Review Is Warranted Because The Supreme Court of Florida's Decision Is In Contravention of Article II Of The Constitution

As discussed in the petition, Article II of the Constitution reserves to the state *legislatures*, not the state *courts*, the authority to determine the manner in which to appoint presidential electors. *See* U.S. CONST. art. II, § 1, cl. 2. The FDP asserts that because this provision delegates authority to the States, disputes over the appointment of electors must rest exclusively on state law, and thus are not subject to federal court review. *See* Opp. 18. While it is true that the appointment of presidential electors in each State will turn on the laws of the individual States, the suggestion that federal courts have no role in this area is demonstrably incorrect. Where a State's judiciary intrudes upon this constitutional grant of authority to the State legislature by eviscerating a state statutory rule applicable to electoral disputes, federal court review is plainly appropriate. *See McPherson v. Blacker*, 146 U.S. 1, 25-26 (1892) ("the words 'in such manner as the Legislature thereof may direct' . . . operat[e] as a limitation upon the State in respect of *any* attempt to circumscribe the legislative power") (emphasis added).[3]

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[3] For all the reasons set forth in petitioner's reply brief in case number 00-837, the FDP's arguments regarding petitioner's federal constitutional claims under the Equal Protection Clause, the Due Process Clause, and the First Amendment are equally without merit, and this Court's review of those claims is warranted.

CONCLUSION

As this Court recognized in *Burroughs v. United States*, 290 U.S. 534, 545 (1934), "[t]he President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

For all the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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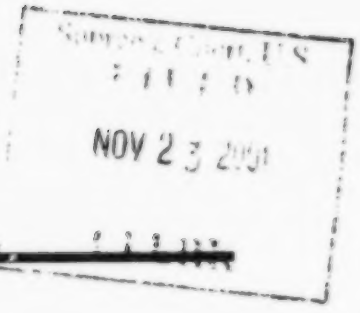

(5)

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *ET AL.*,

Respondents.

Response of Katherine Harris, Florida Secretary of State,
Katherine Harris, Laurence C. Roberts, and Bob Crawford,
as Members of the Florida Elections Canvassing Commission,
to Petition for Writ of Certiorari

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RESPONSE OF KATHERINE HARRIS, FLORIDA SECRETARY OF STATE, KATHERINE HARRIS, LAURENCE C. ROBERTS, AND BOB CRAWFORD, AS MEMBERS OF THE FLORIDA ELECTIONS CANVASSING COMMISSION, TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE AND FACTS AND PROCEDURAL HISTORY

The Secretary of state of Florida (the "Secretary") and the Florida Elections Canvassing Commission (the "Commission")[1] are respondents in this action since they were parties below. In presenting its response, the Secretary and the Commission are focused on Florida's election law as it stood prior to November 21, 2000 (the "Pre-Decision Period"), and how it now stands (the "Post-Decision Period"). November 21, 2000, is the date that the Supreme Court of Florida handed down the decision Petitioners urge this Court to review. *Palm Beach Canvassing Board v. Katherine Harris, et al.*, Case Nos. SC 00-2346, SC 00-2347, and SC 00-2348 (Fla. filed Nov. 21, 2000). Florida's Election Code is set forth at chapters 97 through 106, Florida Statutes.[2] The central

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1. The Commission is composed of the Governor, the Secretary of State, and the Director of the Division of Elections. In this case, Florida's governor recused himself from the certification process and Florida's Commissioner of Agriculture, Bob Crawford, was appointed to fill the vacancy.

2. The Election Code is divided by chapter as follows: ch. 97 ("Qualifications and Registration of Electors"); ch. 98 ("Registration Office, officers, and Procedures"); ch. 99 ("Candidates, Campaign Expenses, and Contesting Elections"); ch. 100 ("General, Primary, Special, Bond, and Referendum Elections"); ch. 101 ("Voting Methods and Procedure"); ch. 102 ("Conducting Elections and Ascertaining the Results"); ch. 103 ("Presidential Electors; Political Parties; Executive Committees and Members"); ch. 104 ("Election Code: Violations; Penalties")' ch. 105 ("Nonpartisan Elections"); and ch. 106 ("Campaign Financing").

focus of this case deals with Chapter 102, which is entitled "Conducting Elections and Ascertaining the Results."

The Secretary is an independently elected constitutional officer within Florida's scheme of an independently elected executive cabinet, composed of a secretary of state, attorney general, treasurer, comptroller and commissioners of Agriculture and Education. The Secretary is also the state's chief elections officer. *See* Fla. Const., art. IV, § 4(b); Fla. Stat. § 97.012. As such, the Secretary is charged with, among other duties, the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. § 97.012(1). The Secretary is also obligated, through the Division of Elections, to "provide advisory opinions when requested by any supervisor of elections . . . relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor . . . has taken or proposes to take." Fla. Stat. § 106.23(2). "The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion . . . ." *Id.*

After the polls close on an election day, two separate periods come into play: (1) the pre-certification protest period (the "Protest Period") (Fla. Stat. § 102.166); and (2) the post-certification contest period (the "Contest Period") (Fla. Stat. §

102.168). The Protest Period commences immediately upon conclusion of the election and concludes when the last county canvassing board certifies its returns. Once that occurs, the Commission certifies the election returns on two separate dates. The first date is seven days after the conclusion of the election, when each county canvassing board is required to report its final returns to the Division of Elections.[3] Three days later, on the tenth day after the elections have concluded, a supplemental filing is made by the county canvassing boards which adds the overseas absentee ballots that have been received by midnight on the tenth day. The combined returns are then certified by the Commission and become the final official returns. Once the combined returns have been received, the Commission certifies the election and declares the winners, after which the Contest Period commences.

Usually, there is no specific end to the Contest Period,[4] as there has been times in Florida when a contest resulted in the removal and substitution of an officer, already years into a term, at the conclusion of a Contest. The Contest Period for any presidential election must, however, be completed six days before the meeting of the state electors, which in this case is December 18, 2000. *See* 3 U.S.C. § 5 (1997). Thus, for the general elections of 2000, the Protest Period began at the time the polls closed at 8 p.m. on November 7 and ended at 5 p.m. on November 14, a period of seven days. The Contest Period was to commence at 5:01 p.m. on November 14, and was to end at midnight on December 12, 2000, or 29 days.

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3. This year all county canvassing boards certified their returns by 5 p.m. on November 14, within the seven day statutory period prescribed by Fla Stat. § 102.11 (2000).

4. A contest must be initiated within 10 days when the last county canvassing board certifies its returns to the state. Fla. Stat. § 102.168(2).

As noted, after the conclusion of an election, any voter or candidate can file a Protest claiming that the election returns are erroneous (Fla Stat. § 102.166(1)). Procedures are set forth for the review of elections by paper ballots, voting machines, and "electronic or electromechanical equipment." There is a provision for manual recounts, but only the candidate or a political party can request such a review. Fla. Stat. § 102.166 (4)(a). The individual voter has no right to ask for a manual recount.[5]

County returns (with the exception of the overseas ballots) were due to the Department of State by 5 p.m. of the seventh day following the election or they would be ignored. *See id.*[6] Before final certification by the county canvassing board for any particular county, the candidates, their political parties or a political committee that supports or opposes an issue that appeared on the

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5. Based upon the plain statutory language and legislative history, the Secretary and the Commission here maintained that manual recounts are only intended to be used when some type of machine or electromagnetic process is involved. App. at 1a.

6. In 1989, the Florida legislature amended the Election Code by adding section 101.112 (directed to county canvassing boards) which states, in pertinent part, the general rule set forth above regarding the seven-day deadline, but adds that "[i]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." *See id.*, § 102.112(1). The amendment also provided a $200 a day fine to be levied against the canvassing board members personally for late returns. *See id.*, § 102.112(2). This was done at the same time as the amendments to section 102.166, Florida Statutes, in response to the machine voting problems that occurred in the Mackay-Mack U.S. Senate race in 1988. *See infra* at 11-12, n.10.

ballot were permitted to file a written request with the county canvassing board for a manual recount. *See id.*, §102.166(4)(a) & (b). If the county canvassing board authorizes the manual recount, the recount must include "at least three precincts and at least 1 percent of the total votes cast for such candidate or issue." *See id.*, § 102.166(4)(c) & (d). If the initial manual recount indicates "an error in the vote tabulation which could affect the outcome of the election," the board could: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the department of state to verify the vote tabulation software; or (c) manually recount all ballots.

On November 7, 2000, voters across the nation cast their ballots for, among other offices, President and Vice President of the United States. In Florida, the initial returns from all the counties showed statewide that Governor George W. Bush was slightly ahead of Vice President Albert Gore, Jr. Because the difference was less one-half of one percent, an automatic statewide recount was conducted by all counties the following day. *See id.*, § 102.141(4). After the recount, Governor Bush maintained a narrow lead over the Vice President. On November 9, the Florida Democratic Executive Committee requested manual recounts in the following counties: Volusia, Palm Beach, Broward and Miami-Dade.

On November 13, 2000, the Palm Beach Canvassing Board ("Palm Beach") requested, in writing, that the Division issue a written opinion as to whether the Department of State or the Commission had the discretion to extend the seven-day statutory filing deadline for election returns. By separate cover, Palm Beach also requested that the Division issue a written opinion as to when a county could authorize a manual recount of ballots.

Later that day, in response to a specific request from election officials, the Division issued two formal advisory opinions. *See* Fla. Stat. § 106.23. In response to the first request from Palm Beach, the Division issued Opinion DE 00-10 (App. at 1a) advising Palm Beach that election results not certified by 5 p.m. Tuesday, November 14 could not be counted in the certification of the statewide results. In response to the second request from Palm Beach, the Division issued Opinion DE 00-13 (App. at 2a) advising Palm Beach that the "error in tabulation" language in the statute that serves as the legal basis for a manual recount means "a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots." App. at 1a-2a.

Also on November 13, the Secretary notified all 67 county elections supervisors that the statutory deadline of 5 p.m. Tuesday, November 14 would not be extended. The Secretary further informed these parties that returns (other than overseas ballots) not filed by the deadline would not be included in the certification of statewide results.

The following day, in response to the requests from Palm Beach County officials, Florida's Attorney General, Bob Butterworth, issued a conflicting opinion, Opinion 00-65, advising Palm Beach that the "error in tabulation" means "a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4), Florida Statutes." App. at 3a.

Volusia County had previously filed a lawsuit in Leon County, seeking to enjoin the Secretary and the Commission from certifying

election results without including returns filed after the seven-day statutory deadline. The Palm Beach County Canvassing Board, Vice President Gore and the Florida Democratic Party ("Democrats") intervened. After an initial hearing, Leon County Circuit Court Judge Terry P. Lewis directed the Secretary "to withhold determination as to whether or not to ignore late filed returns, if any, from Plaintiff Canvassing Boards, until due consideration of all relevant facts and circumstances consistent with the sound exercise of discretion." Bush App. at 50a.

The Secretary's first action in response to the order was to develop a set of evaluative criteria that would be used to decide whether to allow a late filing. First, a set of factors that could justify a late filing was developed. The existence of one or more of these factors, which were drawn from Florida elections case law, could have justified an allowance of late-filing. These factors (and their supporting case law) were:

- Whether there is any indication of voter fraud that could affect the outcome of the election. *In re: Protest of Election Returns*, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

- Whether there was substantial noncompliance with statutory election procedures, causing reasonable doubt to exist as to whether the certified results express the will of the electorate. *Beckstrom v. Volusia County Canvassing Board*, 707 So. 2d 720 (Fla. 1998)

- Whether election officials had made a good faith effort to comply with the statutory deadline, but were prevented from doing so by an act of god or similar circumstance beyond their control.

The Secretary next determined, again based on a review of the pertinent case law, that the following election irregularities would not constitute a sufficient reason for violating the statutory deadline:

- Noncompliance with statutory election procedures and/or voter error, where there is a reasonable expectation that the results express the will of the voters. *Beckstrom*, 707 So. 2d at 725.
- The use of a ballot design that was confusing to some voters because of the location and alignment of candidates names, so long as a reasonable voter could make his or her choice by exercising reasonable time and study. *Nelson v. Robinson*, 301 So. 2d 508, 511 (Fla. 2d DCA 1974).
- Any other situation that presented "nothing more than a mere possibility that the outcome of the election would have been [a]ffected." *Hogan*, 607 So. 2d 508, 510 (Fl. 4th DCA 1992).

As before, the Secretary's decision was based primarily on reported election cases, which found similar circumstances to be insufficient to justify interference with certified election results. The factors applied thus reflected the law of Florida existing before the Supreme Court of Florida's November 21 decision. App. at 16a.

Thereafter, in accordance with Judge Lewis' order, the Secretary distributed a memorandum to all of Florida's 67 counties

requesting that they provide a written statement, including the facts and circumstances that would justify any late filed returns by 2 p.m. Wednesday, November 15. App. at 8a.

On Wednesday, November 15, the canvassing boards for Palm Beach County, Broward County, Miami-Dade County, and Collier County, responded to the Secretary's memorandum, each providing the facts and circumstances that they believed would provide justifications for the Secretary waiving or extending the statutory deadline to permit later changes to their already filed returns. After carefully reviewing each request in light of pre-established criteria based on long-standing Florida law, the Secretary made a determination that none of the facts before her justified a waiver or extension of the deadline. The Secretary and the Division both consistently took the position that voter error was not a basis for initiating a manual count nor to extend the seven day statutory deadline to do so. Volusia County completed its manual hand count before the 5 p.m. deadline on November 14, and those results were included in Volusia County's timely return.[7]

The Commission certified the timely-filed November 14, 2000, election results for all but the overseas ballots. The certification reflects 2,910,492 votes for Governor George W. Bush and Secretary Dick Cheney and 2,910,192 for Vice President Albert Gore, Jr. and Senator Joe Lieberman.

On November 16, the Democrats filed an Emergency Motion to Compel Compliance with and for Enforcement of Injunction ("Emergency Motion"), and asserted that the Secretary

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7. Neither the Secretary nor the Division are permitted to go beyond the local canvassing board's certification. *See* Fla. Stat. § 102.31.

acted arbitrarily and in contempt of Judge Lewis' order by refusing to accept the returns filed after the statutory deadline.

On November 17, Judge Lewis denied the Emergency Motion, ruling that the Secretary had not acted arbitrarily, and that she "exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." Bush App. at 43a. Later that day, the Supreme Court of Florida *sua sponte* entered an order enjoining the Secretary and Commission from finally certifying the results of the November 7 election and declaring a winner in Florida until further order. Bush App. at 39a.

On November 21, 2000, the Supreme Court of Florida reversed Judge Lewis, holding that manual recounts were not limited to instances of machine error, and that the Secretary had abused her discretion in not accepting returns that were not filed within the seven-day deadline set by the legislature. In short, the Court enlarged the statutory Protest Period from seven days to 19 days, and shortened the Contest Period from 29 days to 16 days. The Court's holding changed the law in the state of Florida as it existed and was applied before November 7, 2000.

II.

THE FLORIDA ELECTION CODE PRIOR TO AND AFTER THE SUPREME COURT OF FLORIDA'S DECISION BELOW

Before the evening of November 21, 2000, when the Supreme Court of Florida issued the decision below, Florida's Election Code provided long-standing procedures requiring the reporting of results by specified deadlines, for dealing with errors in vote tabulation, conducting manual recounts in certain limited circumstances involving mechanical or software failure in mechanical voting equipment, certifying electronic results and allowing affected voters to contest the results of an election. In addition, there was a system that accorded much less time to the Protest Period than it did to the Contest Period.

Under the Election Code as it previously existed, any affected voter, political party or candidate could protest election returns before certification of the election results. Fla. Stat. § 102.166(1). In the event of such a protest, the local elections canvassing board had to follow specific procedures to verify the accuracy of the returns. The procedures to be followed varied depending on whether paper ballots designed for hand counting, voting machines, or machine tabulated paper ballots were used. Fla. Stat. § 102.166(3).

As part of section 102.166, only a candidate or political party is also permitted to file a written request with the local canvassing board for a manual recount. Fla. Stat. § 102.166(4)(a). Provided the request was timely, the canvassing board was given discretion as to whether to conduct a manual recount, after conducting a proper, statutorily-defined, test of certain precincts to determine if there was a mechanical or software problem. Fla. Stat. § 102.166(4)(c). The Protest Period had to be completed, and the election results certified to the Florida Secretary of State within seven days of the election. Fla. Stat. § 102.111(1). Immediately

upon such certification, the Commission was required to certify the elections results.[8] *Id.*

The conclusion of this seven-day protest and certification process triggered the right of any affected voter, taxpayer, as well as an unsuccessful candidate or party, to file an elections contest. Fla. Stat. § 102.168(1). Unlike the pre-certification protest procedure, the Contest Period allows for a full evidentiary record to be introduced, and all facts and circumstances surrounding the election to be examined in the courts. Fla. Stat. § 102.168. Further, an election contest allows for a single venue in the circuit court serving the state capitol for lawsuits stemming from a statewide election, Fla. Stat. § 102.1685, and grants broad authority to the court to fashion appropriate relief. *See id.*, at 102.168(8). The Florida Legislature imposed no specific time limitations on a judicial elections contest, but imposed strict time limits on Protests and recounts that precede a certification, which is the prerequisite to a Contest.[9]

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8. Florida law contemplated that the winner of the election would be declared on the seventh day following the election. Fla. Stat. § 102.111. For federal offices, however, a winner cannot be declared until three days later. That is, however, not a matter of state law. A consent decree between the state of Florida and the United States requires Florida to count absentee ballots from citizens living outside the United States that are received up to 10 days following the election. The consent decree was entered into following the enactment of the seven-day certification provisions in the Florida Election Code.

9. The Florida Legislature's intent to have the protest completed within seven days is exemplified by the fact that it imposed strict financial penalties on local canvassing board members who failed to submit timely returns and required the Commission to ignore any counties that fail to file returns within seven days and certify the election results based solely on

In response to a Protest, Florida law, as it existed prior to November 21, allowed manual recounting to be conducted only in certain limited circumstances. Fla. Stat. § 102.166(5). Both the plain language and legislative history of Florida's election statutes indicate that a manual recount of the ballots in a county was proper only where there has been a failure of the vote tabulation system or as required by a circuit court exercising jurisdiction in a properly filed elections contest action.[10] Failure

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those returns that are timely filed. Fla. Stat. § 102.112(1)

10. The provisions of section 102.166, Florida Statutes, at issue were enacted by the Florida Legislature in 1989 in response to concerns about computer failure in elections and the use of unreliable software to tabulate votes. Ch. 89-348, § 15 Laws of Florida. These concerns had been raised in the 1988 race for the United States Senate between Buddy MacKay and Connie Mack and in subsequent news articles. The legislature enacted sections 102.166(4)-(10), Florida Statutes, to address these concerns as part of what was called the "Voter Protection Act." The Senate Staff Analysis and Economic Impact statement for the Voter Protection Act noted:

> An incident of mechanical problems with an electronic voting system occurred in Bradenton, Florida where a seventh of the county's precincts had to be counted twice in one election since the ballots were soggy, became warped and were mangled by the voting equipment. Also, an apparent software "glitch" or error was responsible for an incident in Ft. Pierce when a machine would count the Democratic votes, but would not accept Republican ones.
>
> Other horror stories related to electronic voting systems have been reported on in the media, but in testimony

of certain voters to properly execute their ballots was not a basis for conducting a manual recount, although this issue could be raised in a post-certification elections contest.[11] App. at 1a-2a.

> before the Joint Committee on Information Technology Resources in 1989, supervisors of elections pointed out that there can be problems with any kind of voting system. However, many local election officials would agree that state certification procedures and local logic - and - accuracy tests provide a reasonable assurance that "electronic" elections are honestly counted. It is generally agreed that additional steps could be taken in Florida to improve security procedures, while not hampering the already cumbersome elections process. would enhance public confidence in our voting system.

App. at 10a (emphasis added).

As this legislative history indicates, the statute was intended to provide an alternate recounting procedure to be used in situations in which mechanical or computer problems caused tabulation equipment to fail to function as intended. The legislature never intended for manual recounts to be used to evaluate ambiguous ballots that *voters* failed to properly execute. Consistent with the legislative intent the Division of Elections formal advisory opinion left open the possibility of a full manual recount, but precluded a recount to assign votes to candidates based on improperly executed ballots that cannot be read by properly operating tabulation equipment.

11. The Division Opinion is an administrative interpretation of the statutes within its subject matter jurisdiction and is binding on subordinate agencies such as the Board. This opinion "remains binding until properly amended or revoked by the Division itself, or invalidated by a court having jurisdiction of the matter." *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994); *see also Krivanek v. Take Back Tampa*

Florida has never recognized a common-law right to protest election results, much less to require manual recounting of machine ballots. Prior to November 21, the right to a manual recount existed only to the extent provided by the Legislature. Florida Statutes section 102.166(5) allowed such a recount *only* when there had been an "error in vote tabulation." This term had consistently been interpreted, prior to November 21, to mean a failure of the tabulation equipment to count properly executed ballots.[12] App. at

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Political Committee, 625 So. 2d 840, 844 (Fla. 1993). In contrast, the Board was *not* bound to adhere to the Attorney General's opinion. In fact, it was questionable whether the Attorney General even had the authority to issue an opinion on an election issue, given the specific allocation of this function to the Division of Elections in section 106.23(2).

12. In the weeks before the November 7, 2000, general election, each registered voter in Florida was provided with a sample ballot and detailed instructions on how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in each voting booth. *See* Fla. Stat. § 101.46. In those districts using punch cards, the instructions explained how a voter was to select and punch out the appropriate chad on the ballot. App. at 14a. The instructions included this specific direction:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

Id. When voters followed the instructions, including the removal of any loose chips left attached to their ballots, the automatic tabulation accurately tabulated the ballots. There is no contention otherwise. Only

1a-2a. Thus, when voters failed to mark ballots correctly, there had been no failure in their tabulation under Florida law, and no manual recount was authorized. *Id.*

The Florida Supreme Court's November 21 decision has made a number of changes in Florida's election laws, setting aside some provisions, and implementing others. It has also recognized equitable principals that take precedence over statutory provisions and the exercise of discretion by the Secretary.

First, the requirement that tabulation of election results be completed within seven days has been eliminated. In its place there is a new, judicially-created time limitation that allows at least 19 days to complete the Protest Period before certification, and possibly more when an election protest and request for manual recount have been filed. Bush App. at 38a. Local canvassing board members are now under no duty to comply with the strict time limitations that previously existed and can no longer be fined or have their returns ignored for failing to file certified returns. *Id.*

Second, local canvassing boards may now file amended returns after the statutory deadline, even if they had properly filed returns before the deadline. *Id.* The Secretary of State now has no discretion to reject any such amendment, unless it is so late that it will preclude a candidate or voter from contesting the election or jeopardize the ability of the state to appoint presidential electors within the time limitations of federal law. Bush App. at 37a. Before the November 21 decision, there was no provision in Florida

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the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, would be affected by the manual recount at issue.

statutory law that allowed returns to be amended, much less amended after the statutory time limitation for final certification and declaration of the winner has passed. There was also no statutory provision that required the Secretary of State to accept late-filed returns, or limited late filing specifically to situations where the federal time limitations jeopardize Florida's electoral votes. Indeed the existing Florida law required just the opposite: "If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on the file shall be certified."[13] Fla. Stat. § 102.111(1). Late returns, if they would affect the outcome of the election, could be added only if ordered by a circuit court in an election contest action. Fla. Stat. § 102.168(3)(e) and (8). Before November 21, this statute was consistently interpreted to require submittal of returns within seven days. *See Chappel v. Martinez*, 536 So. 2d 1007, 1009 (Fla. 1984)

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13. This statute governs the Elections Canvassing Commission and sets forth its duties with respect to acceptance of election returns and certification of election results. A related provision, which governs local canvassing boards, states that "[r]eturns must be filed by 5 p.m. on the 7th day following the . . . general election," and puts those boards on notice that "[i]f the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." Fla. Stat. § 102.112(1). While this provision may grant the Secretary of State some discretion in deciding whether to accept late returns. The construction by the Supreme Court of Florida to absolutely require late returns to be accepted or to authorize the post-deadline amendment of returns already filed is clearly a change in what might otherwise be understood from reading the provision, even in connection with section 102.112, Florida Statutes.

(requiring substantial compliance with the deadline and holding that telephone transmittal before the deadline sufficed).

Third, the Florida Elections Canvassing Commission is now precluded from certifying election results on the seventh day following the election, as previously required under Florida Statutes sections 102.111, 102.121 and 102.131. Indeed, even where certified returns were filed by all counties within the time limitations that existed before the November 21 decision, the Commission must now wait at least until November 26 to certify the results of the election.

Fourth, the time frame for an elections contest, the only procedure available to individual voters to challenge the outcome of the election, is now drastically shorter. Under the prior law, the period for filing a contest would have begun with the final certification of results on November 17, and the contest proceeding could have extend until December 12, the federal deadline for appointment of presidential electors. Now, any contest cannot begin until the recounts are completed and the results certified. At the earliest, this will not occur until November 26, cutting the contest period from 25 days – already an extremely short period in which to develop a case conduct discovery, have a trial, and pursue any subsequent appeals – to a mere 15 days.

Finally, but perhaps most importantly, manual recounting may now be used in a significantly broader way than previously available. Prior to November 21, in the absence of a judicial decree rendered in an election contest action, manual recounting was allowed only in the case of mechanical, software or other similar failure in the automated vote tabulation and were considered dehors the common law. The Supreme Court of Florida has now recognized

that these rights are equitably required and grounded in Florida constitutional law.

Under Florida Statutes section 102.166(5) a manual recount was a last-resort remedy to be used in areas with automated tabulation systems only when there was no way to mechanically tabulate the ballots. When a sample manual recount indicated a problem with the vote tabulation system, the local canvassing board first attempted to correct the error and recount the remaining precincts with the system under subsection (5)(a). If the error could not be corrected, a board was allowed request the Department of State to verify the tabulation system under subsection (5)(b). Finally, if the system could not be corrected or verified to work properly, then as a last resort, the board would have manually recounted the ballots under subsection (5)(c). There was never any indication that Florida Statutes section 102.166(5) allowed voter errors caused by improperly marked or punched ballots to be selectively corrected. The statute was enacted to provide a remedy when a vote tabulation system failed to read properly marked ballots, not to provide local canvassing boards the unbridled discretion to choose the method of tabulating votes on an *ad hoc* basis after an election was completed.

As a result of the Supreme Court of Florida's decision, the Secretary, the Commission and Florida's 67 local elections canvassing boards will now treat the election certification process quite differently than they would have previously:

- Where the Secretary would have previously rejected late filed election returns, she is now required to accept those returns, so long as the late filing does not violate the judicially created test of being "so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's

voters from participating fully in the federal electoral process."

- Where the Elections Canvassing Commission would have certified the statewide election on November 17 on the certified returns filed by all of Florida's 67 counties, the Commission must now wait on the results of manual recounts conducted in selected areas, delaying final certification until at least November 26 that must include amendments to the November 14 filing other than overseas ballots.

- Where local canvassing boards were previously precluded from conducting manual recounts in the absence of an error in the vote tabulation system, they now will conduct recounts in almost any circumstance;

- Where each local canvassing board would have submitted only one final set of returns, the local canvassing boards may now conduct a series of recounts and amend their prior certification for some time after the deadline to certify has passed; and

- Where a uniform system of automated counting was previously in place, Florida's votes, including votes for the electoral college, will now be decided based on standards developed by individual local canvassing boards in selected areas of the state.

Dated this 24th day of November, 2000.

Respectfully submitted,

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NOV 24 2000

No. 00-836

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2000

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To The Supreme Court of Florida

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF UNDER RULE 37.1 AND 37.2(A) WITH ATTACHED BRIEF *AMICUS CURIAE* OF JAMES J. CLANCY (MEMBER OF THE U.S. SUPREME COURT BAR) IN SUPPORT OF PLAINTIFF GEORGE W. BUSH.

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5200

QUESTION PRESENTED

Whether, under the **Doctrine of Separation of Powers,** the Florida Supreme Court, in a Federal Election to Determine the Presidency of the U.S., Lacks Subject Matter Jurisdiction to Interfere with the Acts and Duties of Secretary of State Katherine Harris with Respect to the Time Constraints Imposed by Federal Statute Where the Statute as Enacted by the Florida Legislature Has Delegated to the Secretary of State the Power to also Act as a Quasi-Judicial Officer in Election Matters Both Federal and State; and Where the Legal Constraints Which Are Imposed by Such Federal Statute in Federal Elections (Which Have Required Her to Act in the Federal Election) Are Not Present with Respect to State Elections, Because of the Absolute Right of the Florida Supreme Court under the **11TH Amendment** to Act as a Sovereign and to Stop the Clock as May Be Necessary in State Election Matters?"

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF UNDER RULE 37.1 AND 37.2(A) WITH ATTACHED BRIEF *AMICUS CURIAE* OF JAMES J. CLANCY (MEMBER OF THE U.S. SUPREME COURT BAR) IN SUPPORT OF PLAINTIFF GEORGE W. BUSH.

INTEREST OF AMICUS CURIAE

Amicus Curiae is a resident of La Tuna Canyon, California and a member of the U.S. Supreme Court Bar. Over the past 37 years, ***Amicus*** has filed approximately 100 Briefs in the U.S. Supreme Court in two (2) areas of the law involving public morals: **(1)** the crime of obscenity vs. free speech, and **(2)** the common law misdemeanor crime of abortion and infanticide (partial birth abortion) vs. the privacy right expressed in ***Roe v. Wade***, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973).

Amicus contends that, at the present time, both of these areas of the law are poorly regulated by Rules of Law which defy the Natural Law. ***Amicus*** contends that the issue of free speech and the right to abate obscenity as a public nuisance should be regulated by the **11TH Amendment** "state right" expressed by Associate Justice Harlan in his concurring and dissenting opinion in ***Roth v. U.S.*** (***Roth-Alberts***) 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957).

Amicus further contends that the so-called abortion right "created" in ***Roe v. Wade***, supra, is contrary to the Natural Law, that abortion is a "crime", not a "public" right; rather, it is a "private cross" which must be borne by the "family" unit; and that the Common Law misdemeanor crime of "abortion" and the "infanticide crime" (a.k.a. partial birth abortion) are distinguishable and should be regulated as **11TH Amendment** matters relating to "public morals" which are regulated by "State Sovereignty" and by the "State Judiciary" as in the case of the "obscenity" crime.

Amicus' contention that the so-called **11TH Amendment** "State Right" approach should control both of the above areas of the law has caused him to vote for George W. Bush because ***Amicus*** believes that George W. Bush's philosophical view of the law re "obscenity" and "abortion" is closer to the philosophical view of this ***Amicus Curiae*** than is the philosophical view of Albert Gore.

On February 2, 2000, ***Amicus Curiae*** filed a Motion for Leave to File an ***Amicus Curiae*** Brief in ***Pryor v. Summit Medical Associates***, No. 99-1042, which informed the members of this Court that because the Alabama Infanticide Statute had not been given a "definitive construction" by the Alabama Supreme Court, the High Court's decision in that case, under the **11TH Amendment**, was and is an advisory opinion only and did not bind the State. See the nature of the Motions as described on the cover of the ***Amicus Curiae*** and Private Attorney General Briefs in that case at **Appendix A** to this ***Amicus Curiae*** Brief.

On February 28, 2000, ***Amicus Curiae*** filed a Motion for Leave to File an *Amicus Curiae* Brief in ***Stenberg v. Carhart***, No. 99-830, which informed the members of this Court that, because the Nebraska Infanticide Statute had been prevented from being given a "definitive construction" by the Nebraska Supreme Court, the High Court's decision in that case, under the **11TH Amendment**, was and is an advisory opinion and did not bind the State. See the nature of the Motions as described on the cover of the ***Amicus Curiae*** and Private Attorney General Briefs in that case at **Appendix C** to this ***Amicus Curiae*** Brief.

On March 31, 2000, the undersigned filed a Motion for Leave to Intervene Pursuant to **F.R.C.P. 24** and filed that Document in this Court as a Private Attorney General to inform this Court regarding the refusal and failure of Attorney General Bill Pryor to perfect the **11TH Amendment** plea in that case. See the nature of the Motion as described on the cover in that

case at **Appendix B** to this ***Amicus Curiae*** Brief.

RE "DUE PROCESS" AND "EQUAL PROTECTION OF THE LAW"

Amicus supports Petitioner George W. Bush's claim of a right to relief on "due process" and "equal protection of the Law" grounds under the Florida Supreme Court's opinion and further asserts that its opinion abridges the voting rights of the ***Amicus Curiae*** to cast his vote to have George W. Bush succeed to the Presidency. However, ***Amicus*** contends that such rights need not and should not be litigated in this case because those issues need not be reached upon the facts and record in this case. The Petition for a Writ of Certiorari herein should be limited to and resolved by this Court on the Florida Supreme Court's blatant violation of the **Doctrine of Separation of Powers** and the right of Petitioner George W. Bush to a peremptory writ of prohibition/mandate in support of this Court's Appellate Jurisdiction under **Rule 20.1 of the U.S. Supreme Court**.

The Florida Supreme Court's refusal to acknowledge and its avoidance of Petitioner Bush's general claim of a violation of the **Separation of Powers Doctrine** is convincing evidence that the Florida Supreme Court's opinion does, in fact, present a political decision. ***Amicus*** regretfully submits that the seven Justices, by avoiding that issue, demonstrate that they, as Democrats, were misled by their philosophical "desire" that Gore, the Democrat, and not Bush, the Republican, should gain the Presidency.

RE THE 11TH AMENDMENT AND THE JURISDICTIONAL QUESTION PRESENTED, SUPRA.

This Court should note certiorari on the narrower **11TH Amendment** issue which is framed herein regarding the State Statute which was enacted by the Florida State

Legislature. Under ***Watson v. Buck***, 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 A.L.R. 1426 (1941), that part of the State Statute, which refers to the Florida State Legislature's delegation to Secretary of State Katherine Harris the right and duty to act in this federal election contest, has never been given its first interpretation and construction. Under the **11TH Amendment** and the **Separation of Powers Doctrine**, the State Legislature has the sovereign right to have the Statute as enacted construed initially by the State Judiciary which in turn, is under a duty to give it a constitutional interpretation– in this case, not only under the **Florida Constitution**, but also under the **U.S. Constitution**. When the State Legislature delegated this specific responsibility to Secretary Harris, it was assigning to her the duty to act in a quasi-judicial capacity together with the duty to act with discretion in executive matters. Her interpretation to this effect, if reasonable, cannot be upset by the subsequent action of the Florida Supreme Court for the reasons hereinafter explained.

The Jurisdictional Question which ***Amicus Curiae*** has set forth below frames a "rhetorical question" which the Florida Supreme Court must first address– and which this Court must face and decide before it reaches the "due process" and "equal protection of the laws" problems which have been created by the Florida Supreme Court's ***sua sponte*** decision that such a construction is erroneous. It would be wrong for this Court not to resolve this claim which ***Amicus Curiae*** submits is the real and only issue before this Court [V]. The question as framed, and answered by that "framing", reads as follows:

" QUESTION PRESENTED

" Whether, under the **Doctrine of Separation of Powers**, the Florida Supreme Court in a Federal

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[V] Recently the legal profession has come under attack as a profession of "spin artists". More than anything else, we as a people have got to reclaim our pride in the virtue of honesty displayed by George Washington.

Election to Determine the Presidency of the U.S. Lacks Subject Matter Jurisdiction to Interfere with the Acts and Duties of Secretary of State Katherine Harris with Respect to the Time Constraints Imposed by Federal Statute Where the Statute as Enacted by the Florida Legislature Has Also Thereby Delegated to the Secretary of State the Power to Also Act as a Quasi-Judicial Officer in Election Matters Both Federal and State; and Where the Legal Constraints Which Are Imposed by Such Federal Statute in Federal Elections (Which Have Required Her to Act in the Federal Election) Are Not Present with Respect to State Elections Because of the Absolute Right of the Florida Supreme Court under the **11TH Amendment** to Act as a Sovereign and to Stop the Clock as May Be Necessary in State Election Matters?"

STATEMENT OF THE CASE

Amicus accepts the Statement of Facts of Record as s omitted by Petitioner in his Petition for Writ of Certiorari herein, but claims in that regard that the majority of facts, as pleaded, are irrelevant in the light of the "agreed upon facts" of record which are sufficient for a majority of this Court, ***sua sponte***, to grant a peremptory writ of mandamus and/or prohibition, forthwith, pursuant to **Rule 20.1** of the U.S. Supreme Court. Accordingly, ***Amicus Curiae*** requests this Court to consider this pleading of ***Amicus Curiae*** as being in the nature of a Private Attorney General request pursuant to ***Alyeska Pipeline Serv. v. Wilderness Soc.***, 421 U.S. 240, 44 L.Ed.2d 141, 95 S.Ct. 1612 (1975) and moves this Court on behalf of Petitioner for leave of Court to Petition for the additional relief; that is, the issuance of an extraordinary prerogative writ forthwith under **Rule 20.1** of the **U.S. Supreme Court Rules**.

The above"agreed upon facts" as framed in the

rhetorical "Jurisdictional Question" are of record and are probative because they are not disputed. Further, the record is rife with the repetitious legal contention (conclusion) of Petitioner George W. Bush that the Florida Supreme Court's ruling is, ***per se***, a violation of the **Separation of Powers Doctrine**. This Court in its ruling on the Petition can issue its writ of certiorari and a peremptory writ of mandamus and/or prohibition forthwith and without further oral argument or delay in the federal election process.

Had the facts in this case been present in the background of a state election, the decision by the Secretary of State Katherine Harris would have been vulnerable in its review by the Florida Supreme Court because that Court is the ultimate arbiter of legal questions on state matters. In such a case, the Florida Supreme Court has the absolute power to "stop the clock" and render its opinion on what should be done, so long as it is consistent with **Federal Due Process** and **Equal Protection of the Laws** standards. This Court would not have subject matter jurisdiction of such a case unless federal standards were violated.

THE PROBATIVE FACTS

This case, however, involves an all important federal election. The federal time line and time constraints are important and are controlling. The Florida Statute clearly gave the Secretary of State the right to make her initial "call" as a quasi-judicial ruling. This is consistent with the **11TH Amendment** right of the states to enact such legislation on important state matters. The **Separation of Powers Doctrine** in conjunction with the **11TH Amendment** gives the state legislatures the right to enact a law and the additional right under ***Watson v. Buck***, supra, to have the state judiciary give that law its initial construction. If the state court in that "role" concludes that "black" is "white" to save the statute, then the federal court is required to deal with that statute on those terms. However, no such further construction is necessary in this case

because Secretary of State Harris' ruling as a quasi-judicial construction was consistent with the federal requirements. In as much as the aforesaid probative facts of record are admitted, this Court should issue an extraordinary writ of mandate or prohibition forthwith.

A decision on the single narrow grounds herein required is urgently needed. This case presents an opportunity for a majority of this Court to come together quickly on the admitted "Statement of Facts". Because the Florida Supreme Court decision is "notorious" for its partiality, the decision of this Court to review on the above narrow grounds, ***sua sponte***, will be written upon the minds of all law students for an eternity of time and will inform the world at large of that fact– a world which is beginning to look upon the U.S. as the "master of lies" because of the weakness of its leaders and their tendency to choose the "spin doctrine" as a means of lying their way out of an unfortunate situation such as being caught next to the cherry tree with an ax in their hands. The present disaster can be turned into a "blessing" if this Court will act "post haste" by immediately issuing a prerogative writ ordering the Florida Supreme Court to vacate that part of its ruling which reversed the trial court ruling which affirmed Katherine Harris' ruling in this federal case as being proper.

The quicker this Court rules on this matter, the better. The vote tabulation can be tabulated pursuant to the Secretary of State's determination, the President Elect can be identified and that person (Bush or Gore) can go about with his preparation for ascendancy to the Office of the Presidency.

RE: THE CRITICAL ISSUE FRAMED BY THE DIVERSITY IN THE OPINIONS ISSUED BY THE DIVISIONS OF ELECTIONS AND THE ATTORNEY GENERAL

At page 8, the following agreed "Statement of Facts" appears:

"II. Proceedings In The Florida Supreme Court

" The Supreme Court of Florida consolidated the two cases discussed above: (a) the original action brought by the Palm Beach County Canvassing Board asking the court to resolve the conflicting advisory opinions issued by the Division of Elections and the Attorney General; and (b) the appeal from the Leon County Circuit Court's decision that the Secretary of State had not abused her discretion in deciding not to include results from manual recounts filed after the 5:00p.m. November 14 deadline in the statewide tabulation.

" **A. The State Court's Decision**

" On Friday, November 17, 2000, the Florida Supreme Court *sua sponte* enjoined the Secretary of State from certifying the November 7 presidential election results for the State of Florida until further order from the Court. App., *infra*, 40a-41a. On Monday, November 20, after weekend briefing by the parties, the court heard oral argument.

" Late on the evening of November 21, 2000, the Florida Supreme Court issued its opinion reversing the orders of the state trial court. App., *infra*, 1a-39a. The supreme court held that the trial court 'erred in holding that the Secretary of State acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts.' App., *infra*, 35a. The supreme court reached this conclusion by announcing a new rule of law to constrain the Secretary's discretion under Fla. Stat. §§ 102.111 and 102.112, declaring for the first time that 'the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or

preclude Florida's voters from participating fully in the federal electoral process.' *Id.* At 37a."

Amicus disagrees with the position taken by the attorneys for the Petitioner George W. Bush regarding the nature of the "conflicting advisory opinions". ***Amicus*** contends that Petitioner George W. Bush is correct in his assessment on Television that the Florida Supreme Court had "overreached" in its ***sua sponte*** determination that Secretary of State Harris was merely exercising a discretionary act as a member of the Executive Branch. She had, in fact, also exercised the discretion given her by the Florida Legislature; that is, as a "quasi-judicial fact finder" in resolving the "fact" issue created by the fact that the proceeding which was before her involved a federal election and federal time constraints imposed by the federal statutes and not a state election in which such time constrictions did not present a problem.

Because the question which was before her had never been raised, under the **11TH Amendment** and the **Doctrine of Separation of Powers**, the initial statutory construction she rendered as to the time constraint was valid and was binding not only upon the Gore camp, but also upon the Florida Supreme Court which was required to uphold her construction as valid and binding pursuant to the **Separation of Powers Doctrine** requirement that the Florida Supreme Court do everything within its power to support the Legislature and its legislation and prevent a possible conflict with the time constraints of the federal government (which did in fact occur as a result of the Florida Supreme Court's ***sua sponte*** determination).

In this instance, the Florida Supreme Court "overreached". The result would have been otherwise, had the election been a state election. In that case, the Florida Supreme Court would have been the ultimate authority because it would have been concerned with a "state matter" in which the Court was the supreme authority and could have "stopped the clock".

The power which was endowed upon the Secretary of

State Harris by the State Legislature was the equivalent of the fact finding role of a city council in determining from the facts of record whether a zoning determination should or should not be made. In making such a determination, the city council (which as a legislative body normally does not sit in a quasi-judicial capacity) also enjoys its concomitant role as a quasi-judicial fact finder. See, in this regard, the argument made by ***Amicus*** to this Court in his attempt to have this Court note jurisdiction in the claim of ***Clarence F. Murphy v. Planned Parenthood of Greater Iowa, Inc., et al.***, Scott County District Court Case No. 94716, at paragraph 25 on pages C-14 and C-15 (see **Appendix C** herein) which also appears in his ***Amicus Curiae*** Brief in ***Stenberg v. Carhart***, No. 99-930, at Appendix pages C-14 and C-15, which is reproduced herein as **Appendix C-1** through **C-22**.

CONCLUSION

Wherefore, ***Amicus*** requests this Court to construe this Petition for Writ of Certiorari herein as a Petition by George W. Bush for an Extraordinary Writ under **Supreme Court Rule 20.1** and forthwith issue a peremptory writ requiring the Florida Supreme Court to vacate that portion of its November 21, 2000 opinion which reversed the orders of the state trial court as noted on page 8, supra.

Dated: **November 23, 2000** (Thanksgiving Day)

Respectfully submitted

_____

James J. Clancy, ***Amicus Curiae***
and Counsel of Record.

CERTIFICATE OF COUNSEL

Consent to the filing of this ***Amicus Curiae*** Brief is requested of Counsel of Record for Petitioners and Respondents by the Service of this **Motion** and ***Amicus Curiae*** **Brief** (Express Mail to Counsels of Record). A copy could not be faxed to each addressee on Thursday or Friday, November 23-24, 2000 because such Offices were not open for such services.

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MIAMI, FLORIDA 33131 (305) 371-2700

Dated: **November 23, 2000**
(Thanksgiving Day)

_____

James J. Clancy, ***Amicus Curiae***
and Counsel of Record.

APPENDIX A

COVER SHEETS OF 5 PLEADINGS OF THE ***AMICUS CURIAE*** IN ***BILL PRYOR, ATTORNEY GENERAL OF ALABAMA, ET AL. V. SUMMIT MEDICAL ASSOCIATES, P.C., ET AL.***, NO. 99-1041, FILED WITH THE CLERK OF THE U.S. SUPREME COURT ON FEBRUARY 2, 2000; MARCH 31, 2000; APRIL 17, 2000; JUNE 20, 2000; AND JULY 20, 2000, WHICH DESCRIBE THE NATURE OF THE PLEADINGS IN THAT CASE.

(Reference: Brief ***Amicus Curiae*** of James J. Clancy at **page 2, paragraph 2.)**

A-1

No. 99-1041

EXHIBIT 1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and **ELLEN BROOKS**, in her official capacity as Montgomery District Attorney;

Petitioners,

v.

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and WILLIAM H. KNORR, M.D., on behalf of themselves and their patients' seeking abortions;

Respondents.

On Petition for Writ of Certiorari to the
United State Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37(2)(b) WITH ATTACHED BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN SUPPORT OF NEITHER PARTY, SUGGESTING REVERSAL OF THE JUDGMENT FOR RESPONDENTS FOR LACK OF SUBJECT MATTER JURISDICTION; PURSUANT TO THE AUTHORITY OF THE 11TH AMENDMENT, *WATSON V. BUCK*, 313 U.S. 387 (1941); *YOUNGER V. HARRIS*, 401 U.S. 37 (1971); *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975); AND THE *YOUNGER - HUFFMAN* ABSTENTION DOCTRINE.

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Amicus Curiae
*Counsel of Record

February 2, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and ELLEN BROOKS, in her official capacity as Montgomery District Attorney;

Petitioners,

v.

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and WILLIAM H. KNORR, M.D., on behalf of themselves and their patients' seeking abortions;

Respondents.

On Petition for Writ of Certiorari to the United State Court of Appeals for the Eleventh Circuit

---

MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT TO INTERVENE PURSUANT TO F.R.C.P. 24, AND FILE THIS DOCUMENT AS A PETITION FOR REHEARING; AND (2) FOR A WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AS A PRIVATE ATTORNEY GENERAL FOR A CLARIFICATION OF THIS COURT'S RULE OF COURT EXPRESSED IN *PUERTO RICO AUTHORITY V. MEDCALF AND EDDY* RE THE 11TH AMENDMENT PLEA OF ATTORNEY GENERAL BILL PRYOR; TO BE HEARD PURSUANT TO A PETITION FOR REHEARING AND THIS COURT'S *SUA SPONTE* DUTY UNDER *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*, 523 U.S. 836 (MAY 4, 1998) TO CONSIDER "LACK OF SUBJECT MATTER JURISDICTION" AS ITS FIRST ORDER OF BUSINESS.

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MARCH 31, 2000

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EXHIBIT 3

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

BILL PRYOR, in his official capacity as Attorney General for the State of Alabama and his agents and successors; and ELLEN BROOKS, in her official capacity as Montgomery District Attorney;

Petitioners,

v.

SUMMIT MEDICAL ASSOCIATES, P.C.; BEACON WOMEN'S CENTER; NEW WOMAN, ALL WOMEN HEALTH CARE; and WILLIAM H. KNORR, M.D., on behalf of themselves and their patients' seeking abortions;

Respondents.

On Petition for Writ of Certiorari to the United State Court of Appeals for the Eleventh Circuit

MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT TO INTERVENE PURSUANT TO F.R.C.P. 24, AND FILE THIS DOCUMENT AS A PETITION FOR REHEARING; AND (2) FOR A WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AS A PRIVATE ATTORNEY GENERAL FOR A CLARIFICATION OF THIS COURT'S RULE OF COURT EXPRESSED IN *PUERTO RICO AUTHORITY V. MEDCALF AND EDDY* RE THE 11TH AMENDMENT PLEA OF ATTORNEY GENERAL BILL PRYOR; TO BE HEARD PURSUANT TO A PETITION FOR REHEARING AND THIS COURT'S *SUA SPONTE* DUTY UNDER *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*, 523 U.S. 836 (MAY 4, 1998) TO CONSIDER "LACK OF SUBJECT MATTER JURISDICTION" AS ITS FIRST ORDER OF BUSINESS.

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No. 99-M-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

IN RE JAMES J. CLANCY,

Petitioner.

MOTION FOR AN ORDER, DIRECTING CHIEF DEPUTY CLERK FRANCIS J. LORSON OF THE U.S. SUPREME COURT TO TRANSMIT SUBMITTED PLEADINGS TO THE COURT (FILED BY U.S. EXPRESS MAIL ON MARCH 31, 2000) IN *BILL PRYOR, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF ALABAMA, AND HIS AGENTS AND SUCCESSORS; AND ELLEN BROOKS, IN HER OFFICIAL CAPACITY AS MONTGOMERY DISTRICT ATTORNEY*, NO. 99-1041, BEING 40 COPIES OF THE "MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT TO INTERVENE PURSUANT TO F.R.C.P. 24, AND FILE THIS DOCUMENT AS A PETITION FOR REHEARING; AND (2) FOR A WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AS A PRIVATE ATTORNEY GENERAL FOR A CLARIFICATION OF THIS COURT'S RULE OF COURT EXPRESSED IN *PUERTO RICO AUTHORITY V. MEDCALF AND EDDY* RE THE 11TH AMENDMENT PLEA OF ATTORNEY GENERAL BILL PRYOR; TO BE HEARD PURSUANT TO A PETITION FOR REHEARING AND THIS COURT'S *SUA SPONTE* DUTY UNDER *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*, 523 U.S. 836 (MAY 4, 1998) TO CONSIDER 'LACK OF SUBJECT MATTER JURISDICTION' AS ITS FIRST ORDER OF BUSINESS."

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JUNE 20, 2000

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

IN RE JAMES J. CLANCY,

Petitioner.

MOTION OF JAMES J. CLANCY FOR LEAVE OF COURT TO FILE A DECLARATION UNDER PENALTY OF PERJURY IN SUPPORT OF TWO MOTIONS AS AN INTERVENOR-PRIVATE ATTORNEY GENERAL FILED BY U.S. EXPRESS MAIL ON JUNE 20 AND JUNE 25, 2000 IN *IN RE CLANCY*, NO. 99-M-___, WHICH REQUESTED AN ORDER DIRECTING DEPUTY CLERK LORSON TO TRANSMIT TO THIS COURT THREE MOTIONS WHICH HAD BEEN FILED BY U.S. EXPRESS MAIL ON MARCH 31, 2000 IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES*, NO. 99-1041; AND ON APRIL 23 AND JUNE 4, 2000 IN *STENBERG V. CARHART*, NO. 99-830; WHICH MOTIONS GAVE NOTICE TO THE COURT AS A PRIVATE ATTORNEY GENERAL AND INTERVENOR THAT AN ISSUE OF THE U.S. DISTRICT COURT'S LACK OF FEDERAL SUBJECT MATTER JURISDICTION UNDER THE 11TH AMENDMENT AND THE *YOUNGER* AND *WATSON V. BUCK* ABSTENTION DOCTRINES WAS BEFORE THE COURT IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES*, SUPRA, AND *STENBERG V CARHART*, SUPRA, AND THE OTHER PARTIAL BIRTH ABORTION CASES, AND MUST BE ADDRESSED BEFORE THE COURT COULD PROCEED TO RENDER A "BINDING" JUDGMENT ON THE MERITS IN *STENBERG V. CARHART*, SUPRA, PURSUANT TO THE U.S. SUPREME COURT "JURISDICTIONAL" RULES ESTABLISHED IN *BENDER V. WILLIAMSPORT AREA SCHOOL DISTRICT*, 475 U.S. 534 AT 541 (1986) AND *STEEL CO. V. CITIZENS FOR A BETTER ENVIRONMENT*, 523 U.S. 83 (1998).

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JULY 20, 2000

APPENDIX B

COVER SHEETS OF 6 PLEADINGS OF THE ***AMICUS CURIAE*** IN ***STENBERG V. CARHART***, NO. 99-830, FILED WITH THE CLERK OF THE U.S. SUPREME COURT ON FEBRUARY 28, 2000; APRIL 14, 2000; APRIL 19, 2000; APRIL 23, 2000; JUNE 4, 2000; AND JUNE 25, 2000, WHICH DESCRIBE THE NATURE OF THE PROCEEDINGS IN THAT CASE.

(Reference: Brief ***Amicus Curiae*** of James J. Clancy at **page 3, paragraph 1.)**

B-1

No. 99-830

EXHIBIT 2

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF UNDER RULE 37.3(b) WITH ATTACHED BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN SUPPORT OF NEITHER PARTY, SUGGESTING REVERSAL OF THE JUDGMENT FOR RESPONDENTS FOR LACK OF ARTICLE 3, §2 FEDERAL SUBJECT MATTER JURISDICTION; PURSUANT TO THE AUTHORITY OF THE 11TH AMENDMENT, *WATSON V. BUCK*, 313 U.S. 387 (1941); *YOUNGER V. HARRIS*, 401 U.S. 37 (1971); *HUFFMAN V. PURSUE, LTD.*, 420 U.S. 592 (1975); AND THE *YOUNGER - HUFFMAN* ABSTENTION DOCTRINE.

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B-4

No. 99-830

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the
State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT TO INTERVENE AS A DEFENDANT, PURSUANT TO F.R.C.P. 24, AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL TO DEFEAT THE CLAIM OF "FEDERAL SUBJECT MATTER JURISDICTION" BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (2) TO SEEK A CLARIFICATION OF THIS COURT'S RULE WHICH AUTHORIZES AN INTERLOCUTORY "APPEAL" ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* WHERE THIS COURT DID NOT ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (3) FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988.

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April 23, 2000

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No. 99-830

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the State of Nebraska, et al.

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPLICATION FOR EMERGENCY ORDER AUTHORIZING MOVING PARTY TO PARTICIPATE IN ORAL ARGUMENT ON APRIL 21, 2000 ON "LACK OF SUBJECT MATTER JURISDICTION" OF U.S. DISTRICT COURT, AS REQUESTED IN MOTION FILED IN THIS COURT ON APRIL 14, 2000.

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California Bar No. 26946

April 19, 2000

B-6

No. 99-M-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

IN RE JAMES J. CLANCY,

Petitioner.

MOTION FOR AN ORDER, DIRECTING CHIEF DEPUTY CLERK FRANCIS J. LORSON OF THE U.S. SUPREME COURT TO TRANSMIT SUBMITTED PLEADINGS TO THE COURT (FILED BY U.S. EXPRESS MAIL ON APRIL 23 AND JUNE 4, 2000) IN *DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, ET AL., V. LEROY CARHART, M.D.*, NO. 99-830 BEING: (A) 40 COPIES OF THE APRIL 23, 2000 "MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT TO INTERVENE AS A DEFENDANT, PURSUANT TO F.R.C.P. 24, AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL TO DEFEAT THE CLAIM OF 'FEDERAL SUBJECT MATTER JURISDICTION' BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (2) TO SEEK A CLARIFICATION OF THIS COURT'S RULE WHICH AUTHORIZES AN INTERLOCUTORY 'APPEAL' ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* WHERE THIS COURT DID NOT ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (3) FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988."; AND (B) 40 COPIES OF THE JUNE 4, 2000 "MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT AND 'JUST CAUSE' TO AMEND HIS ORIGINAL PLEADING FILED APRIL 23, 2000, IN WHICH HE SEEKS TO INTERVENE AS A DEFENDANT PURSUANT TO F.R.C.P. 24, AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL, TO DEFEAT CARHART'S 'RACE TO THE FEDERAL COURTHOUSE' WITH A MERITLESS CLAIM, BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (2) TO SEEK A CLARIFICATION OF THIS COURT'S RULE IN *PUERTO RICO SEWER AUTHORITY V. MEDCALF & EDDY* WHICH AUTHORIZES AN INTERLOCUTORY 'APPEAL' ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* IN WHICH THIS COURT FAILED TO ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (3) FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988."

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JUNE 25, 2000

B-5

No. 99-830

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the
State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

MOTION OF JAMES J. CLANCY, A MEMBER OF THE U.S. SUPREME COURT BAR: (1) FOR LEAVE OF COURT AND "JUST CAUSE" TO AMEND HIS ORIGINAL PLEADING FILED APRIL 23, 2000, IN WHICH HE SEEKS TO INTERVENE AS A DEFENDANT PURSUANT TO F.R.C.P. 24, AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL, TO DEFEAT CARHART'S "RACE TO THE FEDERAL COURTHOUSE" WITH A MERITLESS CLAIM, BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (2) TO SEEK A CLARIFICATION OF THIS COURT'S RULE IN *PUERTO RICO SEWER AUTHORITY V. MEDCALF & EDDY* WHICH AUTHORIZES AN INTERLOCUTORY "APPEAL" ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* IN WHICH THIS COURT FAILED TO ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (3) FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988.

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JUNE 4, 2000

B-2
No. 99-830

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DON STENBERG, Attorney General of the
State of Nebraska, et al.,

Petitioners,

v.

LEROY CARHART, M.D.,

Respondent.

On Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

MOTION: (1) FOR RECONSIDERATION OF MOTION TO FILE AN ATTACHED BRIEF AMICUS CURIAE; (2) TO INTERVENE AND FILE A PETITION FOR WRIT OF MANDAMUS PURSUANT TO 28 U.S.C. §1651(a) AND AS A PRIVATE ATTORNEY GENERAL TO DEFEAT THE CLAIM OF "FEDERAL SUBJECT MATTER JURISDICTION" BY INVOKING THIS COURT'S DUTY TO CONSIDER SUBJECT MATTER JURISDICTION AS ITS FIRST ORDER OF BUSINESS; (3) TO SEEK A CLARIFICATION OF THIS COURT'S RULE WHICH AUTHORIZES AN INTERLOCUTORY "APPEAL" ON SUBJECT MATTER JURISDICTION, AS APPLIED IN *PRYOR V. SUMMIT MEDICAL ASSOCIATES* WHERE THIS COURT DID NOT ADDRESS THE 11TH AMENDMENT PLEA RAISED BY THE ALABAMA GOVERNOR; AND (4) TO ADDRESS THIS COURT AT ORAL ARGUMENT ON "SUBJECT MATTER JURISDICTION"; AND FOR AN ATTORNEY'S FEE AS A PREVAILING DEFENDANT UNDER 42 U.S.C. §1988.

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April 14, 2000

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APPENDIX C

THE ARGUMENT MADE BY ***AMICUS*** TO THIS COURT IN THE CLAIM OF ***CLARENCE F. MURPHY V. PLANNED PARENTHOOD OF GREATER IOWA, INC., ET AL.,*** SCOTT COUNTY DISTRICT COURT CASE NO. 94716, AT PARAGRAPH 25 ON PAGES C-14 AND C-15 AND IN HIS ***AMICUS CURIAE*** BRIEF IN ***STENBERG V. CARHART,*** NO. 99-930, AT APPENDIX PAGES C-14 AND C-15, WHICH IS REPRODUCED HEREIN AS **APPENDIX C-1** THROUGH **C-22**, THAT SECRETARY OF STATE KATHERINE HARRIS ALSO ACTED IN A DUAL CAPACITY BOTH AS A QUASI-JUDICIAL FACT FINDER (SIMILAR TO THE FUNCTION OF THE CITY COUNCIL MEMBERS, AS LEGISLATORS, IN THE DETERMINATION OF A FACT QUESTION ON A ZONE CHANGE APPLICATION) AND NOT MERELY AS A STATE OFFICIAL EXERCISING HER DUTIES WITH RESPECT TO AN ADMINISTRATIVE MATTER.

(Reference: Brief *Amicus Curiae* of James J. Clancy at **page 2, paragraph 3, page 10, paragraph 1.)**

IN THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

	)	**Case No. 94716**
Clarence F. Murphy,	)	
Plaintiff,	)	**First Amended Petition for a**
	)	**Declaratory Judgment and**
vs.	)	**an Injunction to Prevent**
	)	**Planned Parenthood's Use of**
Planned Parenthood of	)	**Land for the Obnoxious and**
Greater Iowa, Inc.	)	**Offensive Trade of Abortion**
Defendant,	)	**and Infanticide in Violation**
	)	**Of: (1) Petitioner Murphy's**
and	)	**Successful Statutory Protest**
	)	**Pursuant to Bettendorf**
The City of Bettendorf,	)	**Zoning Code §24.2 and**
Iowa	)	**§24.4; and (2) Paragraph 3**
Defendant,	)	**of the Reciprocal Restrictive**
	)	**and Protective Covenants**
and	)	**That Run with Both**
	)	**Petitioner Murphy's Lot 3 of**
Middle Road Investors, Inc.	)	**Block 4 and the Adjoining**
Defendant.	)	**Land of Planned Parenthood**
	)	**to the South, Which Lies**
		Between Block 4 and Block 1
		and Within the Quad City
		Technological Center, a
		Planned Unit Development
		(P.U.D. Zone).

COMES NOW Plaintiff, Clarence F. Murphy, and for his Petition for a Declaratory Judgment and Injunction, states as follows:

PARTIES

1. Petitioner Clarence F. Murphy and his wife Hwa Cha Murphy (hereinafter called "Petitioner Murphy" and "Murphy") are citizens of Bettendorf, Iowa, who reside at 2835 Willow Drive, Bettendorf, Iowa. Murphy and his wife are the owners of two twelve plex apartments known as 2655 Tech Drive, Bettendorf (a.k.a. Lot 3, of Block 4) and 2750 Tech Drive, Bettendorf (a.k.a Lot 2 of Block 2) of the Quad City Technological Center, a planned unit development and hold title to such properties in the name of Murpak Enterprises, Inc., a Delaware Corporation which is wholly owned by Murphy and his wife Hwa Cha.. See **Exhibit** pages **C-3** and **C-4**, infra.

2. Lot 3 of Block 4 was conveyed by Middle Road Investors, Inc. (hereinafter called "Defendant Middle Road" and "Middle Road") to Petitioner Murphy by Warranty Deed dated January 30, 1976, which was filed with the Office of Scott County Recorder on February 18, 1976 as Document 2524-76 (after the Iowa Supreme Court decision in ***Kuntz*** [infra, 1975] and ***Harris***, [infra, 1975]). Defendant Middle Road had acquired its ownership by Warranty Deed from the City of Bettendorf (hereinafter called "Defendant Bettendorf" and "Bettendorf") on the same date (February 18, 1976) in partial performance of a contract dated November 7, 1972 and recorded in the Office of Scott County Recorder as Document 1947-73. The abstract for the Plat of Lot 3 of Block 4, which is attached as **Exhibit A** and incorporated by reference herein, contains the following certification at page **A-3**, last paragraph:

> " NOW THEREFORE, Middle Road Investors, Inc., and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold, conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 11, 1973, as Document #5134-73 with the platting of Block 1 of

> Quad City Technological Center shall remain in effect and apply to Lot 3 of Block 4 as platted herein.
>
> " Dated this 20th day of January, 1976.
>
> MIDDLE ROAD INVESTORS, INC.
> By Robert D. Danico, President
> By C.J. Munson, Secretary
>
> CITY OF BETTENDORF, IOWA
> By William C. Glynn, Mayor
> By Margaret W. Lake, Deputy City Clerk"

3. Lot 2 of Block 2 was conveyed to Petitioner Murphy and his wife by Ed Speer Construction, Inc. by Warranty Deed dated February 25, 1994 and filed on March 4, 1994 in the Office of Scott County Recorder as Document No. 7001-94 in full performance on that real estate contract dated June 1, 1979 and recorded on January 23, 1980 in the Office of the Scott County Recorder as Document No. 1155-80. The abstract for the Plot of Lot 2 of Block 2 which is attached as **Exhibit B** and incorporated by reference herein shows that the Defendant Bettendorf was an owner with Middle Road of Block 2 and contains the following certification at page **B-3**, last paragraph:

> " NOW THEREFORE, Middle Road Investors, Inc., and the City of Bettendorf, Iowa, hereby declare that the real property described in the Surveyor's Certificate is and shall be held, transferred, sold, conveyed and occupied subject to the Restrictive and Protective Covenants heretofore filed on April 11, 1973, as Document #5134-73 with the platting of Block 1 of Quad City Technological Center shall remain in effect and apply to Lot 2 as platted herein. In addition thereto, each lot owner of Lots in said Block 2 shall share the common driveways into said Block 2 from Tech Drive and P.U.D. Drive.

" Dated this 1st day of July, 1975.

MIDDLE ROAD INVESTORS, INC.
By Robert D. Danico, President
(Corporate Seal) By C.J. Munson, Secretary

CITY OF BETTENDORF, IOWA
By William C. Glynn, Mayor
(Seal of City of Bettendorf, Iowa)
By James W. Strieck, Clerk"

4. Defendant Planned Parenthood of Greater Iowa, Inc. (hereinafter called "Defendant Planned Parenthood" and "Planned Parenthood") is the present owner of a parcel of land within the metes and bounds of the Planned Unit Development (hereinafter "P.U.D. Zone") known as Quad City Technological Center to the City of Bettendorf, lying between Block 1 and Block 4, the Lot having been purchased by Defendant Planned Parenthood on April 14, 1997. The northern boundary of the Planned Parenthood property abuts and forms the southern boundary of Lot 1, Lot 2 and Lot 3 of Block 4. The southern boundary of the Planned Parenthood property abuts and forms the northern boundary of Block 1, and the northern boundary of the right of way know as Happy Joe Drive, as shown on the two maps which are attached to this Petition as **Exhibit C** and pleaded by incorporation herein. At the time of the platting of Lot 3 of Block 4, it was the expressed intention of Defendant Bettendorf and Defendant Middle Road, as the developers of the Quad City Technological Center to the City of Bettendorf, to place the same "restrictive" and "protective" covenants that were attached to Block 1 on the future development and platting of the P.U.D. Zoned Planned Parenthood property, which was owned in fee simple by Defendant Bettendorf and Defendant Middle Road, so that the "benefits" and "restrictions" on all of the said Lots in said land development were "reciprocal", as expressed and accomplished in the recording of the platting of Blocks 1 through 6 as a whole, see **Exhibit D** to this Petition (infra, at page **D-3**, the first paragraph and page **D-6**, paragraph

11) and pleaded by incorporation herein. Petitioner avers that the terms of the restrictive and protective covenants were extended by the developer, Defendant Middle Road, for a finite period of 10 years to the year 2003 to provide time to complete the platting of the plan as a whole, so that upon the completion of that land development, each of the lots within the P.U.D. Zone would have and enjoy the same benefits and burdens.

5. By the platting of Lot 3 of Block 4, Petitioner Murphy's property was burdened by the restrictive covenants but did not, at that time, receive the promised reciprocal benefits (the "protective" covenants) from the adjoining Planned Parenthood property the title to which, was thereafter "clouded" by the "equitable protective servitude" which attached to Murphy's land to the north. The "restrictive" and "protective" covenants in the platting of Lot 3, Block 4 are writings which establish a bilateral contract between Defendant Bettendorf and Defendant Middle Road as the developers and Murphy who, by virtue of his purchase of Lot 3, Block 4, joined in the unilateral agreement of Defendant Bettendorf and Defendant Middle Road, who owned the said "P.U.D. Zoned" Planned Parenthood land in fee simple in 1975.

6. The City of Bettendorf is named as a Defendant because of its participation with Middle Road in the draftsmanship and approval of Paragraphs 3 and 11 of the Restrictive (burden) and Protective (benefit) Covenants as noted above and in that part of the Abstract for the Final Plat of Block 1 (see **Exhibit A-2** and **A-3** and **Exhibit D** to this Petition at pages **D-1** through **D-11**) which reads in part as follows with respect to Paragraphs 3 and 11:

"RESTRICTIVE AND PROTECTIVE COVENANTS

" MIDDLE ROAD INVESTORS, INC., an Iowa Corporation, hereby establish and declare the following restrictive and protective covenants to be applicable to the following described real estate located in Scott

County, Iowa, to-wit: All lots in Blocks 1 through 6 of The Planned Unit Development known as Quad City Technological Research Center, to the City of Bettendorf, Iowa, which plat is recorded as Document No. 5134-73 in the office of the Recorder of Scott County, Iowa:

" 1. No building . . . .

" . . . .

" 3. No obnoxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the other lot owners in said addition.

" . . . .

" 11. These restrictions shall be in force from the date of the Owner's Certificate to which it is an exhibit until January 1, 1993 or until such later date to which the same may be extended as hereinafter provided, and shall run with and be binding upon all lots in said addition, and every part thereof and shall be appurtenant to and for the benefit of all said lot owners. These restrictions shall be automatically extended for an additional ten-year period on January 1, 1993, and each ten year anniversary of said date unless a written instrument signed and acknowledged by the owners of a majority of all the lots in Quad City Technological Center shall prior to such date or anniversary be recorded with the Recorder of Scott County, Iowa, abrogating or modifying the same in whole or in part to the extent therein set forth. In determining the majority of said lot owners, each lot shall be entitled to one vote to be cast according to the will of a majority in interest of any co-owners having interest therein whether such majority is represented by a majority of the undivided

interests in an entire lot or ownership of the greater portion of a subdivided lot. A contract purchaser or life tenant of the legal title shall be deemed the owner. In all other respects, ownership shall refer to record owner ship of legal title." (Our emphasis.)

" 11. Invalidity, abandonment or waiver of any one or more of the same restrictions shall in no wise affect any of the other restrictions, which shall remain in full force and effect.

" 12. In the event any person who may at any time own or occupy any of the numbered lots, or part thereof, in said Addition should violate or threaten to violate any of these restrictions, said Middle Road Investors, Inc. its successors and assigns, and the owners from time to time of any of the numbered lots in said Quad City Technological Center shall have the right to proceed in any court of law or equity, by injunction or otherwise, to enforce performance and restrain violation, or pursue any other remedy to which it or they may be entitled and shall have the right to collect from the party or parties violating or threatening to violate the same, either jointly or severally, all damages, costs, expenses and counsel fees resulting from the violation thereof, or incurred in, or in connection with, said proceedings.

"Dated at Bettendorf, Iowa, this 3rd day of April, 1973.

Middle Road Investors, Inc.
By: Robert D. Danico, President
(Corporate Seal) By: C.J. Munson, Secretary"

7. Thereafter, Middle Road did not plat Block 5 and 6 as planned. Instead, on June 16, 1976 (5 month after the conveyance of Lot 3, Block 4 to Murphy), Defendant Middle Road, without Notice to Murphy, conveyed the Planned Parenthood property by a Warranty Deed to "Robert Versman

and Rose Versman, husband and wife, as tenants in common, and to their heirs and assigns." The legal document conveying the real estate, contains an asterisk and the typed instruction reading "subject to restrictive covenants recorded as document 5134-73 S.C. Iowa Rec. Off." which is initialed by Robert D. Danico as President and C.J. Munson, as Secretary of Middle Road, Inc. (see Document 10830-76 at **Exhibit E** to this Petition).

8. 10 years later, on December 23, 1986, Robert H Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 25349-86, recorded on December 31, 1986, at **Exhibit F** to this Petition which contains the typed instruction reading: "Subject to: 1. Easements, covenants and restrictions of record.")

9. On December 24, 1986, Robert H. Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 1735-87, recorded on January 28, 1987 at **Exhibit G** to this Petition which contains the typed instruction reading: "Subject To: Easements, covenants and restrictions of record" and "This Warranty Deed confirms the deed executed by the Grantors on December 23, 1986, . . . recorded in the Scott County Recorder's office as Document No. 25349-86 and ratifies and approves the conveyance of a total of one-half of the real property legally described in Exhibit A hereto").

10. On January 3, 1987, Robert H. Versman and Rose Versman conveyed an undivided 1/12 interest in the Planned Parenthood property to each of the following six persons (a total of 50%):

Kenneth J. Versman
Linda Jean Versman
Stuart J. Heller
Judith Lee Heller
Frederick J. Glassman
Frances Belle Glassman

(See Document 1736-87 recorded on January 28, 1987 at **Exhibit H** to this Petition which contains the typed instruction reading: "Subject to: Easements, covenants and restrictions of record" and "This Warranty Deed confirms the deed executed by the Grantors on Jan. 2, 1987 recorded in the Scott County Recorders office as Document 165-87 and ratifies and approves the conveyance of a total of one-half of the real property legally described in Exhibit A hereto.")

11. On April 14, 1997, Kenneth J. Versman and Linda Jean Versman, Husband and Wife, Stuart J. Heller and Judith Lee Heller, Husband and Wife, and Frederick J. Glassman and Frances Belle Glassman, Husband and Wife, conveyed by Warranty Deed the Planned Parenthood property to Planned Parenthood of Greater Iowa, Inc. or Planned Parenthood of Greater Iowa Foundation, Inc. (See Document 09482-97, dated April 14, 1997 and recorded April 24, 1997 at **Exhibit I** to this

Petition (last in order).

PETITIONER MURPHY'S CONTENTIONS

12. An actual controversy has arisen between Petitioner Murphy and Defendants, relating to the legal rights and duties of Defendant Planned Parenthood and Defendant Bettendorf, in respect to said Lots as those rights and duties are affected by Paragraph 3 and Paragraph 11 of the above stated Restrictive (burden) and Protective (benefit) Covenants. Petitioner Murphy contends that Paragraph 11 must be construed against its co-author Defendant Bettendorf and read to extend the Restrictive and Protective Covenants automatically for an additional, finite ten-year period on January 1, 1993 to January 1, 2003 without reference to that language which appears after the "comma" which follows the date "January 1, 1993". It would appear that such "finite" language was adopted to keep the first additional 10-year period extension in compliance with the requirements of **Bettendorf Code §614.24** which was enacted in 1966 and was interpreted by the Iowa Supreme Court in ***Compiano v. Kuntz***, 226 N.W.2d 245 (Iowa 1975) and ***Presbytery of Southeast Iowa v. Harris***, 226 N.W.2d 232, 237-38, 242 (Iowa 1975). Because the "finite" 10-year extension period was accomplished during the first 21-year period and was a recorded document, it met the requirements of **Bettendorf Code §614.24**, which then read "unless the claimant shall, by himself, or by his attorney or agent . . . . Shall file a verified claim with the recorder of the county wherein such real estate is located within said twenty-one year period".

13. Defendant Bettendorf is a **Home Rule** City in the State of Iowa which is empowered to enact zoning ordinances (i.e., P.U.D. and C-5 Zones) and amendments (zone changes) on real property in the City of Bettendorf, acting by and through the Bettendorf City Council, and to act as "parens patria" on behalf of Petitioner Murphy and other Bettendorf residents

(citizens) in defense of their property rights under such zoning ordinances when such zoning rights of the City of Bettendorf are challenged by third parties in a Federal District Court in a Federal Civil Rights action pursuant to **42 U.S.C. §1983**.

14. Such zoning ordinances and zone changes are accomplished by a legislative act by the City Council to accomplish the same. Under the **Doctrine of Separation of Powers**, the general rule is that the Courts cannot write or rewrite the zoning laws, nor force the legislative body to enact or amend a zoning ordinance. An amendment which is adopted in disregard of the protest of property owners who are acting pursuant to a valid "protest" ordinance, is void. The City of Bettendorf is a necessary party in that a Federal Judgment of U.S. District Court Judge Charles R. Wolle in a Federal Civil Rights action brought by Defendant Planned Parenthood, purports to rezone the Planned Parenthood property (P.U.D. Zone to C-5 Zone). Under the **Doctrine of Separation of Powers**, the general rule is that a federal court has no power (lack of subject matter jurisdiction) to rezone real property in the City of Bettendorf, which function (zoning), under the U.S. Supreme Court decision in ***Huffman v. Pursue, Ltd.***, infra., must be held to be both a "municipal affair" and an "important state matter" which is protected by the **11th Amendment**.

15. Defendant Planned Parenthood wishes to construct a clinic in Bettendorf, Iowa which will cater to the "abortion" trade. The **Bettendorf Zoning Ordinance** allows abortion clinics on property in a C-5 zone. Had Planned Parenthood purchased a C-5 Zoned property, it would not have had a zoning problem. Instead, it chose to purchase a property in a P.U.D. Zone (which was surrounded by and within 200 feet of three relatively new residential apartment complexes on Lots 1, 2, and 3 of Block 4 which were benefitted by a **Bettendorf "Protest" Ordinance**) and submitted an application for a Zone Change by ordinance to C-5.

16. The adjacent apartment owners (see **Exhibit C–**

Murphy and Jecklin) and Larry Whitty, the owner of Lot 1, Block 1 objected and made a successful statutory protest (**20% Rule**) against the zone change (being within 200 feet of the Planned Parenthood property), pursuant to **Bettendorf Zoning Code §24.2** and **§24.4**, which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 for the zone change. The City Council on March 16, 1996, voted 5-1 not to adopt the C-5 Zoning ordinance.

17. Zoning Rights are "**Vested Rights**" under Iowa Law and the **Iowa Constitution**. The 8th Circuit Court of Appeals has so held in its decision in ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983). Under Iowa case law, a City Council's action on a zone change request is broadly defined to be a "judicial function" which can be appealed by Writ of certiorari to the Iowa District Courts, see ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 at 692 (Iowa Supreme Court 1980). If such an appeal is not filed within 30 days, the City Council's actions become final under Iowa law, in which case, under the **11th Amendment** and ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 at 606, fn. 18 and 19 and the progeny of ***Huffman*** (***University of Tennessee v. Elliott***, 470 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 [1986], and ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75, 70 L.Ed.2d 56, 104 S.Ct. 892 [1984], and ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 [CA 8th 1995]), the City Council's quasi-judicial order also becomes final and ***Res Judicata*** under Federal law, because the federal courts are required to give this ***Res Judicata*** **Rule** the same interpretation given it by the state court.

18. On March 21, 1997, one year and two days after the City Council's denial of the zoning change, Defendant Planned Parenthood filed a Civil Rights Action under **42 U.S.C. §1983** in the U.S. District Court (pleading what is, in essence, an appeal from the Bettendorf City Council's quasi-judicial Order denying the C-5 zoning Application). Planned

Parenthood did not name as defendants the adjacent apartment owners and Larry Whitty, who made the successful statutory protest.

19. The City of Bettendorf filed a Motion for a Partial Summary Judgment, pursuant to the **11th Amendment** and the ***Res Judicata*** **Doctrine**. U.S. District Judge Charles R. Wolle (egregiously) denied the city's ***Res Judicata*** Plea. Upon the conclusion of the Federal trial, Judge Wolle entered a judgment which purported to rezone the property to C-5 Zoning.

20. Petitioner Murphy timely moved to intervene (immediately after the City of Bettendorf announced its decision not to act as "***parens patria***" and pursue an appeal from the Judgment of U.S. District Court Judge Wolle), and within the appeal time period, for the purpose of appealing U.S. District Court Judge Wolle's Judgment on **11th Amendment** (lack of subject matter) jurisdictional and other grounds, including his denial of Bettendorf's Summary Judgement Motion on a plea of ***Res Judicata***.

21. U.S. District Court Judge Wolle ruled (cursorily and egregiously) on Petitioner Murphy's extensive pleadings: (1) that the Intervention Motion was "untimely", (2) refused to address the merits of Petitioner's right to mandatory intervention, and the **11th Amendment** Jurisdictional and ***Res Judicata*** issues raised by Murphy at the time of Murphy's Intervention Motion, and (3) further refused to set such matters for oral argument.

22. In the Court of Appeals below, Petitioner Murphy sought judicial relief from Judge Wolle's arrogation of Federal Judicial Power in two separate forms: by the filing of a direct appeal and by the filing of a verified complaint in an original Petition for Writ of Mandamus in the 8th Circuit Court of Appeals, pursuant to **28 U.S.C. §1651(a)**.

23. In a highly unorthodox ruling, the Court of Appeals treated the Appellant's Opening Brief on the direct appeal and the original petition for a prerogative writ of mandamus as though they had been consolidated, and in a brief single order, denied the Petition for Writ of Mandamus without an opinion and summarily affirmed Judge Wolle's Judgment, also without opinion. The Court of Appeals thereafter also denied a Petition for Rehearing and Suggestion for Rehearing En Banc in each of the two cases. The U.S. Supreme Court refused to issue its discretionary Writ of Certiorari to review such erroneous rulings.

24. Petitioner Murphy contends that the **11th Amendment** and the **Doctrines** of ***Res Judicata*** and ***Stare Decisis*** control this litigation and that both of the Federal Courts were in error in their refusal to address the issue of "lack of subject matter jurisdiction" of the Federal Courts under the **11th Amendment** claim. See ***Steel Co. v. Citizens for a Better Environment***, 523 U.S. 83, 140 L.Ed.2d 210, 118 S.Ct. 1003 (March 4, 1998), at **Point III** (duty to address the questions of subject matter jurisdiction as the first order of business, and on its own motion, if the parties to the lawsuit do not bring the matter to the trial court's attention); ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf and Eddy, Inc.***, 121 L.Ed.2d 605 at 610, 506 U.S 139, 113 S.Ct. 684 (1993) (creating a new **Rule of Court** re the issue "lack of subject matter jurisdiction"), ***Wisconsin Dept. of Correction v. Schacht***, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378, 118 S.Ct. ___, No. 97-461 (June 22, 1998) (Associate Justice Kennedy's concurring opinion re the issue of "lack of subject matter jurisdiction"). See ***Kerr v. U.S. District Court***, 426 U.S. 394, 48 L.Ed.2d 725, 96 S.Ct. 2119 (1976); ***Will v. U.S.***, 389 U.S 90, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967); and **Supreme Court Practice**, 7th Ed., Stern, Gressman Shapiro, Geller, at page 495.

25. Plaintiff Murphy further contends: (1) that he is entitled to a Declaratory Judgment in the District Court of Iowa which holds that, under Iowa Law, the Bettendorf City

Council's action on the above zone change is a "judicial" function which became final when Defendant Planned Parenthood did not perfect an appeal to the Iowa District Court by Writ of Certiorari within 30 days of the date on which the City Council acted; (2) that the record shows that the adjacent apartment owners made a successful statutory protest which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 for the Zone Change, and that the City Council on March 19, 1996 voted 5-1 not to adopt the C-5 Zoning Ordinance; (3) that pursuant to such successful protest, the adjacent apartment owners acquired "**vested rights**" in the City Council's Final Order (judgment); and (4) that the City Council's final order which denied the C-5 Zoning Application was and is a final judgment which, under Iowa law and the **Constitutional Doctrine of *Res Judicata*** was and is entitled to recognition by the U.S. District Court, the 8TH Circuit Court of Appeals and the U.S. Supreme Court.

26. Murphy believes and avers that the Bettendorf City Attorney, Greg Jaeger, will acknowledge on behalf of the Defendant Bettendorf: (1) that the adjacent property owners did make a successful protest under the **Bettendorf "Protest" Ordinance**, which reads as follows:

> "24.4 In case the commission does not approve the proposal or in case of a protest against such change signed by twenty (20) percent or more of one or more of the following groups:
>
> " (a) Property owners of the lots included in such proposed change.
>
> " (b) Property owners immediately adjacent in the rear thereof extending the depth of one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).

" (c) Property owners immediately adjacent in the front thereof extending the depth of one lot or not to exceed two (200) feet therefrom (excluding street right-of-way).

" (d) Property owners immediately adjacent to any and all sides (including the front and rear sides) of the proposed change extending one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).

" Such amendment shall not become effective except by the favorable vote of at least three-fourths (3/4) of all the members of council.";

(2) that the **"Protest" Ordinance** is constitutionally valid and was validly applied; and (3) that the **Doctrine of *Res Judicata*** as pleaded by Defendant Bettendorf in the Federal Civil Rights lawsuit did, in fact, require that the Civil Rights action which was filed in the U.S. District Court be dismissed for lack of subject matter jurisdiction under the **11th Amendment** and ***Huffman***, supra.

27. Murphy further avers that, upon the successful termination of the Declaratory Judgment proceedings before this Court, Plaintiff intends to file a Declaratory Judgment Action in the U.S. District Court to have Judge Wolle's Judgment vacated on the ground that the Federal District Court lacked **Article 3, §2** subject matter jurisdiction under the **11th Amendment**, and the U.S. Supreme Court's ***Huffman*** **Abstention Doctrine**, ***Rooker-Feldman*** **Abstention Doctrine**, ***Res Judicata*** **Doctrine**, and the ***Stare Decisis*** **Doctrine**, and for other reasons which have been made of record in the U.S. District Court, the U.S. Court of Appeals for the 8th Circuit, and the U.S. Supreme Court; and if necessary, will petition the U.S. Supreme Court for a Writ of Certiorari on the **11th Amendment** issue and

Substantial Federal Questions which have been presented to the U.S. Supreme Court by the conflict in the determination of this issue by the State of Iowa and Federal Judiciary. See, in this regard, the copy of the pleadings on file in the U.S. Court of Appeals for the 8th Circuit and in the U.S. Supreme Court which are being lodged concurrently with the Clerk of this Court by Petitioner Murphy.

28. No other adequate remedy other than that herein prayed for exists by which the rights of the parties hereto may be determined; in that (1) U.S. District Court Judge Wolle has egregiously (willfully, knowingly and wrongfully) denied Petitioner Murphy's lawful right to intervene in the Federal Civil Rights action of Defendant Planned Parenthood, as an indispensable party; in order that he might appeal the (egregiously) erroneous judgment of Judge Wolle which created the opportunity for Planned Parenthood to engage in a course of conduct which constitutes a breach of **Bettendorf Zoning Code §24.2** and **§24.4** and Paragraph 3 of the Restrictive and Protective Covenants; (2) the Court of Appeals for the 8th Circuit refused to entertain Petitioner Murphy's appeal from Judge Wolle's erroneous judgment and a Petition for Writ of Mandate; and (3) the U.S. Supreme Court refused to exercise its discretionary review of the Federal Court record by Writ of Certiorari. Because Murphy was wrongfully denied the right to intervene in the Federal Civil Rights lawsuit, he is not bound by Judge Wolle's Judgment in the Civil Rights action under the **Doctrine of *Res Judicata***; see ***International Union v. Scofield*** 382 U.S. 205, 15 L.Ed.2d 272 (1965).

29. Murphy avers and contends that the Restrictive and Protective Covenants which were established by the Defendant Middle Road Investors, Inc. on April 3, 1973 at the time of the platting of Block 1 (see Petition at **Exhibit D-1** through **D-11**) and re-established and confirmed by the Defendant Middle Road Investors, Inc. on January 20, 1976 as the owner and proprietor of Lot 3 of Block 4, as set forth at **Exhibit A-2** and **A-3** to this Petition, run with the land and were

fully operational and binding on all parties during the period January 20, 1976 through January 1, 1993; and on that date were automatically extended for an additional ten year period from January 1, 1993 through January 1, 2003 by the provision of paragraph 11 of the Restrictive and Protective Covenants (see **Exhibit D-6** and **D-7**) and were and are presently operative and binding on all parties, including the Defendant Planned Parenthood of Greater Iowa, Inc. from and after April 14, 1997, when Planned Parenthood received title to such property by Warranty Deed from Kenneth J. Versman, etc. (see Petition at paragraph 11 on page 6 of the Petition and Document 09482-97, dated April 14, 1997 and recorded April 24, 1997 at **Exhibit I** to this Petition [last in order]).

30. Defendant Planned Parenthood's projected use of such property in the face of the successful protest of the Bettendorf residents adjoining such property under **Bettendorf "Protest" Zoning Code §24.2** and **§24.4** constitutes an immediate and continuing breach of Paragraph 3 of the Restrictive and Protective Covenants which requires that "No obnoxious or offensive trade shall be carried on upon any lot nor shall anything be done thereon which may be, or become, an annoyance or nuisance to the other lot owners in said addition." (Our emphasis.)

31. Petitioner has no adequate remedy at law to compensate for the harm to the reputation and contemporary community standards of the City of Bettendorf, Iowa which flows from the knowledge of the general public that land in Bettendorf, Iowa, a Home Rule City, which is adjacent and within 200 feet of an existing residential neighborhood is being used for the conduct of early abortions, late term abortions, and partial birth abortions also known and referred to as "infanticide". Under these facts and circumstances, and upon this record, Defendant Planned Parenthood must be held to be engaged in a trade which is "obnoxious" and "offensive" as a matter of law under the terms of paragraph 3 of the Restrictive and Protective Covenants (see **Exhibit D-5** to this Petition); and

is both a public and private nuisance under the **English Common Law**, the early **American Common Law**, the **Statutes of the State of Iowa** and the **"Protest" Zoning Code, §24.2** and **§24.4** of the City of Bettendorf. The Defendant's continuous breach of said Covenant and maintenance of a public and private nuisance will result in irreparable harm to the value of Petitioner's land and the pecuniary amount of such damage, which is impossible to ascertain, warrants the issuance of a preliminary injunction.

QUESTIONS PRESENTED FOR THE IOWA DISTRICT COURT ON THIS PETITION FOR A DECLARATORY JUDGMENT.

1. Whether **Bettendorf Zoning Code §24.2** and **§24.4** are constitutional on their face?

2. Whether the order of the Bettendorf City Council which denied the Planned Parenthood Zone Change Application from P.U.D. to C-5 zoning by a 5-1 vote is ***Res Judicata*** under Iowa law because Planned Parenthood did not timely appeal such order to the Iowa District Court by Writ of Certiorari?

3. Whether that part of the record which shows that three of the adjacent property owners (Clarence Murphy [Petitioner], owner of Lot 3, Block 4, Lois Jecklin, owner of Lots 1 and 2 of Block 4, and Larry Whitty, owner of Lot 1, Block 1) made a successful statutory protest under **Bettendorf Zoning Code §24.2** and **§24.4**, mandates a ruling by this Court that the zoning on the Planned Parenthood property under Iowa law is "P.U.D." and remains as "P.U.D."?

CONCLUSION

The complex propositions of Iowa Zoning law which are framed by this Petition provide irrefutable, positive proof:

(1) that legal issues involving the zoning laws of a state are "important state matters" which are protected by the **11th Amendment** and the ***Huffman*** **Abstention Doctrine**, and (2) that a U.S. District Judge lacks "subject matter jurisdiction" of such issues which, according to the laws of probability, will be decided differently for each state based upon the Judicial Policy of the state which is affected. The U.S. Supreme Court has held in the ***Huffman*** cases that, pursuant to the ***Res Judicata*** **Doctrine**, the U.S. District Court must extend to such State Court judgments the interpretation given by the State Court Judiciary (the equivalent of the "**Full Faith and Credit**" provision of the **Federal Constitution** which governs the responsibility of the Judiciary of State Courts to acknowledge the judgments of the Judiciary of other State Courts).

WHEREFORE, Petitioner prays that judgment be entered against the Defendants:

1. For a Declaration, pursuant to Iowa Law, that the Bettendorf City Council's action on Planned Parenthood's Zone Change Application from PUD to C-5 Zoning is a judicial function which became final when Defendant Planned Parenthood did not perfect an appeal to the Iowa District Court by Writ of Certiorari within 30 days of the date on which the City Council acted on such Application; that the record shows that the **"Protest" Ordinance** is constitutional and was applied in a constitutional manner; that pursuant to said successful protest, the adjacent property owners acquired "**vested rights**" in the City Council's Final Order (judgment); that the City Council's denial of the C-5 Zoning Application, under the constitutional **Doctrine of *Res Judicata*** is a Final Judgment and that the Zoning on the Planned Parenthood property under Iowa law is "P.U.D." as enacted by the Bettendorf City Council.

2. That during the pendency of this action, a preliminary injunction issue to enjoin and restrain the Defendant Planned Parenthood from the acts and conduct aforesaid.

3. That the Defendant Planned Parenthood be restrained and enjoined from violating and continuing to violate and breach **Bettendorf "Protest" Ordinance §24.2 and §24.4** and Paragraph 3 of the Protective Covenants that runs with Lot 3 of Block 4 during the time the same is to remain in force and effect;

4. For costs, and attorneys fees and other relief as provided above; and

5. For such other and further relief as the Court may deem proper.

DATED: January ___, 2000

Respectfully submitted,

_____

Clarence J. Murphy, Plaintiff

VERIFICATION

State of California) Declaration under Penalty of
} SS: Perjury, Pursuant To California
Los Angeles County) Code of Civil Procedure §2015.5

I am the attorney for Plaintiff Clarence J. Murphy and as such attorney, the facts as pleaded in the above Petition are more fully known to me. I therefore make this Declaration and declare under penalty of perjury under the laws of California that the forgoing **First Amended Petition for a Declaratory Judgment and an Injunction** is true and correct.

Dated: January 31, 2000
Location: 9055 La Tuna Canyon Road
La Tuna Canyon, California 91352-2221

/S/

James J. Clancy, California Bar No. 26946
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La Tuna Canyon, California 91352-2221
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Attorney for Petitioner Clarence J. Murphy

No. 00-836

ORIGINAL

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Of Florida

FILED
NOV 2 .. 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION TO FILE PETITION FOR A WRIT OF CERTIORARI IN 8½-by 11-INCH PAGE PROOFS

Petitioner George W. Bush, as candidate of the Republican Party for the office of President of the United States of America, respectfully requests leave to file a petition for a writ of certiorari in 8½-by 11-inch page proofs (with printed copies to filed shortly hereafter as soon as is reasonably practicable).

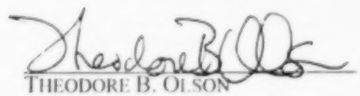
Petitioner received the most votes in the State of Florida in the presidential election held November 7, 2000. That result was confirmed by a statewide recount, and confirmed again after a tabulation of overseas absentee ballots. The Supreme Court of Florida has held, however, that the Secretary of State cannot certify those election results in accordance with preexisting Florida law and must instead wait for the statutorily untimely results of manual recounts being conducted in three Florida counties before certifying the results of the November 7, 2000 presidential election. In an opinion issued on November 21, 2000 (at 9:45 p.m.), the Supreme Court of Florida ruled that the

Secretary of State must accept the untimely results of those manual recounts if those results are submitted to her by Sunday, November 26, 2000 (or by the morning of November 27, in the event the offices of the Secretary of State are not open for that purpose on Sunday).

Because those manual recount procedures are not only untimely under preexisting statutory law but also are being conducted under *ad hoc* and constantly shifting standards in a politically-charged, partisan atmosphere, the judgment of the Supreme Court of Florida clearly conflicts with 3 U.S.C. § 5 and multiple provisions of the United States Constitution. In light of the schedule established by the Court below, the imminence of the Thanksgiving holiday, and the need for extraordinary expedition in order to secure a definitive judicial resolution of this controversy in advance of December 18, 2000—when the Electoral College will meet to select the next President and Vice President of the United States—it is simply not feasible to file a certiorari petition that complies with the requirements of Rule 33. Petitioner therefore seeks leave to file their petition in 8½-by

11-inch page proofs, with the understanding that printed versions of the petition, complying with the requirements of Rule 33, will be filed soon as is reasonably practicable after the filing of the petition.

Respectfully submitted.



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Counsel for Petitioner

November 22, 2000

No.

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *Et Al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Florida

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 22nd day of November, 2000, I caused one copy of **MOTION TO FILE PETITION FOR A WRIT OF CERTIORARI IN 8½-by 11-INCH PAGE PROOFS** the Petition For A Writ Of Certiorari to be served by facsimile, and one copy to be served by United States mail, postage prepaid, on counsel identified below. All parties required to be served have been served.

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By: _____
Thomas G. Hungar

No. 00-836

ORIGINAL

FILED
NOV 2 .. 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

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GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITIONER'S MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI AND TO SET EXPEDITED SCHEDULE FOR BRIEFING AND ARGUMENT

Petitioner George W. Bush, as candidate for President of the United States of America, respectfully requests that this Court expedite its consideration of the petition for a writ of certiorari in this case. Pursuant to Supreme Court Rule 25.4, petitioner further requests that, if the Court grants the petition, it expedite the schedule for briefing and oral argument.

This is a case of the utmost national importance, involving the Constitution's most fundamental rights as exercised in the Nation's most important election. The outcome of the election for the Presidency of the United States may hang in the balance.

Petitioner Bush received the most votes in the State of Florida in the presidential election held November 7, 2000. That result was confirmed by a statewide recount, and confirmed again after a tabulation of overseas absentee ballots. Yet the Supreme Court of Florida has prevented state officials from certifying the appointment of electors in ac-

cordance with the popular vote. Instead, state officials have been compelled to postpone any final decision pending the completion of a selective, capricious and standardless manual recount of ballots cast in only a handful of unrepresentative Florida counties. As explained in greater detail in the accompanying petition for certiorari, the manual recount currently being conducted is riddled with severe and pervasive irregularities, including the physical manipulation and degradation of ballots, manifest inconsistencies in counting methods, and a politically charged, partisan atmosphere—all of which have combined to spawn a process that now borders on anarchy.

Petitioner seeks a writ of certiorari to review the constitutionality of these arbitrary and *ad hoc* recount procedures, which are being employed in an apparent effort to influence after the fact the will of the citizens of Florida and possibly to change the outcome of the presidential election.* Review by this Court is warranted in order to ensure the legality, fairness, and legitimacy of the election. The Florida Supreme Court's action in this case also raises substantial federal questions as to the State's compliance with Article II and 3 U.S.C. § 5, which impose limitations on the manner in which States can resolve disputes regarding the appointment of presidential electors.

This Court's expedited consideration of the petition is warranted to halt the ongoing rampant violations of petitioner's constitutional rights, to address events that are turning the presidential election in Florida into a circus, and to restore stability by bringing the 2000 presidential election to orderly finality in accordance with constitutional law. Time is plainly of the essence: Florida must certify its representatives to the Electoral College before December 18, 2000—the date on which the College meets to select the next President and Vice President of the United States. *See* 3 U.S.C. § 7; *see also* 3 U.S.C. § 5 (setting December 12, 2000 as the deadline for resolving controversies regarding electors). If this matter is not resolved prior to that time, not only petitioners but the Nation as a whole may suffer injury from the resulting confusion. Indeed, the intense national and worldwide attention on the recount efforts to date only foreshadows the disruption that may well follow if the uncertainty and unfairness that have shrouded this election are allowed to persist. Simply put, the importance of a prompt resolution of the federal constitutional questions presented by this case cannot be overstated.

Should this Court grant the petition for certiorari, an expedited briefing schedule is necessary for the same reasons. Particularly given the importance of the issues presented, it is in the best interests of the parties, as well as the Nation, that this Court have as much time as possible to consider the relative merits of the parties' positions and to issue its decision sufficiently in advance of the Electoral College's selection of the next President and Vice President on December 18, 2000.

This Court has previously granted expedited treatment of cases involving substantial questions of national importance. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex parte Quirin*, 317 U.S. 1 (1942). The importance of this case is at

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* A petition for certiorari and motion for expedited consideration is being filed contemporaneously in *Siegel v. LePore*, No. _____, arising out of a federal lawsuit that raises closely related issues. Because the questions raised in that case are similar, and in many instances identical, to those raised in this proceeding, petitioner respectfully requests that the cases be consolidated for briefing and argument.

least equal to, if not greater than, those landmark decisions. The Presidency itself is at stake.

Accordingly, petitioner respectfully submits that respondents should be directed to file their response(s) to the petition by 9:00 a.m. on Friday, November 24, 2000; that petitioner submit his Reply Brief in support of Certiorari by 9:00 a.m. on Saturday, November 25; and that the Court issue its ruling on the petition as soon as practicable thereafter.

If certiorari is granted, petitioner submits that opening briefs for petitioner and respondents, together with any *amicus curiae* briefs, should be filed and served by 7:00 p.m. on Wednesday, November 29, 2000; that reply briefs for petitioner and respondents to be filed and served by 7:00 p.m. on Friday, December 1, 2000; and that oral argument to be held on the afternoon of Tuesday, December 5, 2000.

Respectfully submitted this 22d day of November, 2000.

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No.

IN THE

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v.

PALM BEACH COUNTY CANVASSING BOARD, *Et Al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Florida

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 22nd day of November, 2000, I caused one copy of **PETITIONERS' MOTION TO EXPEDITE CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI AND TO SET EXPEDITED SCHEDULE FOR BRIEFING AND ARGUMENT** the Petition For A Writ Of Certiorari to be served by facsimile, and one copy to be served by United States mail, postage prepaid, on counsel identified below. All parties required to be served have been served.

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By: _____
Thomas G. Hungar

FOR ARGUMENT

(13)

Supreme Court, U.S.
FILED
NOV 24 2000
CLERK

No. 00-836

IN THE

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GEORGE W. BUSH,

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v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

JOINT APPENDIX

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Petition for Writ of Certiorari Filed November 22, 2000
Certiorari Granted November 24, 2000

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Letter from Miami-Dade County Canvassing Board to Secretary of State (Nov. 15, 2000), Exhibit G to Emergency Motion (No. 00-2700) JA-12

Letter from Collier County Canvassing Board to Secretary of State (Nov. 15, 2000), Exhibit G to Emergency Motion (No. 00-2700) JA-14

Letter from Broward County Canvassing Board to Secretary of State (Nov. 15, 2000), Exhibit G to Emergency Motion (No. 00-2700) .. JA-16

Letter from Palm Beach County Canvassing Board to Secretary of State (Nov. 15, 2000), Exhibit G to Emergency Motion (No. 00-2700) JA-19

Secretary responses:

a. Letter from Secretary of State to Palm Beach County Canvassing Board (Nov. 15, 2000), Exhibit H to Emergency Motion (No. 00-2700) JA-21

b. Letter from Secretary of State to Miami-Date County Canvassing Board (Nov. 15, 2000), Exhibit H to Emergency Motion (No. 00-2700) JA-26

c. Letter from Secretary of State to Broward County Canvassing Board (Nov. 15, 2000), Exhibit H to Emergency Motion (No. 00-2700) JA-30

d. Letter from Secretary of State to Collier County Canvassing Board (Nov. 15, 2000), Exhibit H to Emergency Motion (No. 00-2700) JA-35

Memorandum from Division of Elections to Supervisors of Elections regarding Amended Certification of Returns (Nov. 14, 2000), Exhibit E to Emergency Motion (No. 00-2700) JA-39

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Division of Elections Opinion 00-10 (Nov. 13, 2000), Exhibit B to Emergency Motion (No. SC00-2700) JA-49

Division of Elections Opinion 00-11 (Nov. 13, 2000), Exhibit C to Emergency Motion (No. SC00-2700) JA-52

Division of Elections Opinion 00-12 (Nov. 13, 2000), in Exhibit E to Emergency Petition (No. SC00-2345), itself Exhibit F to Emergency Motion (No. 00-2700) JA-54

Division of Elections Opinion 00-13 (Nov. 13, 2000), Exhibit D to Emergency Petition (No. SC00-2345), itself Exhibit F to Emergency Motion (No. 00-2700) JA-56

Statement of Katherine Harris, Secretary of State of Florida (Nov. 13, 2000), Exhibit 2 to Nov. 13, 2000 Hearing, at tab 4 of Appendix to Initial Brief of Albert Gore, et al. (Nos. SC00-2346, SC00-2348, & SC00-2349) JA-59

Letter from Palm Beach County Canvassing Board to Attorney General (Nov. 13, 2000), Exhibit G to Emergency Petition (No. SC00-2345), itself Exhibit F to Emergency Motion (No. 00-2700) JA-63

Letter from Palm Beach County Canvassing Board to Division of Elections (Nov. 12, 2000), Tab 1 of Appendix to Answer Brief of the Secretary of State, et al. (Nos. SC00-2346, SC00-2348, SC00-2349) JA-65

Florida Department of Elections Report of Voter Turnout (Nov. 7, 2000), Tab 4 of Appendix to Answer Brief of the Secretary of State, et al. (Nos. SC00-2346, SC00-2348, SC00-2349) JA-67

* * * *

The following judgments, memoranda, orders and statutes have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the printed *Petition for a Writ of Certiorari*:

Opinion of the Supreme Court of Florida (Nos. SC00-2346, SC00-2348, & SC00-2349) (Nov. 21, 2000) 1a

Stay Order of the Supreme Court of Florida (Nos. SC00-2346, SC00-2348, & SC00-2349) (Nov. 17, 2000) 39a

Leon County Circuit Court Order Denying Emergency Motion (No. 00-2700) (Nov. 17, 2000) 42a

Interim Order of the Supreme Court of Florida (No. SC00-2346) (Nov. 16, 2000) 41a

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Fla. Stat. § 102.168 ..... 56a

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* * * *

The following U.S. Code sections and U.S. Constitution articles have been omitted in printing this joint appendix because they appear on the following pages of the printed *Petition for a Writ of Certiorari*:

3 U.S.C. § 5 2

U.S. Const., art. II. 3

SUPREME COURT OF FLORIDA

Case No. SC00-2346

Palm Beach County Canvassing Board, et al.

v.

Katherine Harris, et al.

RELEVANT DOCKET ENTRIES

Date	Description
11/15/00	PETITION-PROHIBITION Filed By: PT Palm Beach County Canvassing Board By: PT Bruce Rogow 0067999
11/15/00	MOTION-INTERVENE Filed By: MR Hon. George W. Bush By: ME Barry Richard 0105599 Order: Order-Response/Reply Requested Notes: Of George W. Bush (O&9)
11/15/00	MOTION-INTERVENE Filed By: MP Broward County Canvassing Board By: MP Edward A. Dion 267732 Order: Order-Response/Reply Requested Notes: By Broward County Canvassing Board's & The Broward County Supervisor of Elections' Motion to Intervene and/or To Join in Emergency Proceedings; Alternatively, Motion To Consolidate, with Diskette
11/15/00	MOTION-INTERVENE Filed By: MP Hon. Albert A. Gore, Jr. By: MP W. Dexter Douglass 0020263 Order: Order-Response/Reply Requested

Date	Description
	Notes: Of Albert A. Gore and the Florida Democratic Executive Committee, with Diskette
11/16/00	RESPONSE Filed By: MR Hon. George W. Bush By: ME Barry Richard 0105599 Notes: Of the Intervenor George W. Bush to Petitioner's Emergency Petition for Extraordinary Writ (O&9, with Diskette)
11/16/00	RESPONSE Filed By: RS Hon. Katherine Harris By: Deborah K. Kearney 0334820 Notes: Of Katherine Harris, as Secretary of State, to the Emergency Petition for Extraordinary Writ Filed by the Palm Beach County Canvassing Board (O&7, with Diskette); 11/16/00 Filed Amended Response (O&9, with Diskette)
11/17/00	ORDER-OTHER SUBSTANTIVE Notes: Stay Order – Enjoining Respondent From Certifying the Results of the 11/07/2000 Presidential Election Until Further Order of this Court; It Is Not the Intent of This Order To Stop the Counting and Conveying to the Secretary of State the Results of Absentee Ballots or Any Other Ballots – To "View" Order See SC00-2348
11/21/00	DISP-DISMISSED MISC. Manner: Order by Judge
11/21/00	MANDATE Notes: As to SC00-2348 & SC00-2349 (cc: Couns/DCA-1)

SUPREME COURT OF FLORIDA

Case No. SC00-2348

Volusia County Canvassing Board, et al.

v.

Katherine Harris, et al.

RELEVANT DOCKET ENTRIES

Date	Description
11/17/00	CERTFD JUDGMENT FROM TRIAL COURT
11/17/00	ORDER-OTHER SUBSTANTIVE Notes: Stay Order – Enjoining Respondent from Certifying the Results of the 11/07/00 Presidential Election Until Further Order of this Court; It Is Not the Intent of This Order To Stop the Counting and Conveying to the Secretary of State the Results of Absentee Ballots or Any Other Ballots
11/17/00	ORDER-ORAL ARGUMENT CALENDAR/BRF SCHED Notes: Cases Consolidated for All Appellate Purposes (SC00-2346, SC00-2348, SC00-2349); Initial Brief Due by 2:00 PM 11/18/00, Answer Brief Due by 12:00 Noon 11/19/00; Reply Brief Due by 3:00 P.M. 11/19/00 & ROA Due by 12:00 Noon 11/18/00 (To "View" Order See SC00-2346)

Date	Description
11/18/00	INITIAL BRIEF-MERITS Notes: Al Gore, Jr. & Florida Democratic Party (O&7 w/Disk)
11/18/00	ORDER-OTHER SUBSTANTIVE Notes: Volusia County Canvassing Board's Notice of Voluntary Dismissal Is Approved & Volusia County Canvassing Board Is Hereby Dismissed as a Party in the Above Case
11/18/00	INITIAL BRIEF-MERITS Notes: Broward County Canvassing Board/ Broward County Supervisor of Elections (O&7 w/Disk)
11/19/00	ANSWER BRIEF-MERITS Filed By: AE Hon. George W. Bush By: AE Barry Richard 0105599 Notes: O&7 w/Disk
11/21/00	DISP-REVERSED Manner: Per Curiam Release To West: 11/21/00 Pages: 43 Notes: Trial Court's Orders; No Mot/Rehearing Allowed.
11/21/00	MANDATE Notes: cc: Couns/DCA-1

SUPREME COURT OF FLORIDA

Case No. SC00-2349

Florida Democratic Party

v.

Katherine Harris, et al.

RELEVANT DOCKET ENTRIES

Date	Description
11/17/00	CERTFD JUDGMENT FROM TRIAL COURT Filed By: AA Florida Democratic Party By: AA Karen A. Gievers 0262005 Notes: With Order from DCA Certifying Case to This Court and Order from Circuit Court Denying Emerg. Mot. To Compel Compliance with and for Enforcement Of Injunction
11/17/00	ORDER-ORAL ARGUMENT CALENDAR/BRF SCHED Notes: Cases Consolidated for All Appellate Purposes (SC00-2346, SC00-2348, SC00-2349); Initial Brief Due by 2:00 PM 11/18/00, Answer Brief Due by 12:00 Noon 11/19/00, Reply Brief Due by 3:00 P.M. 11/19/00 & ROA Due by 12:00 Noon 11/18/00 (To "View" Order See SC00-2346)

Date	Description
11/21/00	DISP-REVERSED Manner: Per Curiam Release to West: 11/21/2000 Pages: 43 Notes: Trial Court's Orders; No Mot/Rehearing Allowed. . . .
11/21/00	MANDATE Notes: cc: Couns/DCA-1

CIRCUIT CIVIL COURT
FOR COUNTY OF LEON

Case No. CV00-02700

Michael McDermott, et al.

v.

Katherine Harris, et al.

DOCKET ENTRIES

Date	Description
11/13/00	Complaint
11/13/00	Plaintiff Motion for Temporary Restraining Order and Preliminary Injunction
11/13/00	Plaintiff's Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction
11/13/00	Motion To Intervene of George W. Bush
11/13/00	Notice of Appearance by Harold McLean
11/13/00	Notice of Appearance by Bill Bryant for Bob Crawford
11/13/00	Motion of Al Gore To Intervene
11/14/00	Notice of Supplemental Authority
11/14/00	Defendants' Notice of Supplemental Authority
11/14/00	Order Granting in Part Denying in Part Motion for Temporary Injunction F&E
11/14/00	Matt Butler's Supplemental Memorandum of Law in Support of Motion To Dismiss and/or To Deny Preliminary Injunction

Date	Description
11/14/00	Defendants' Memorandum in Opposition to Motion for Temporary Restraining Order and Preliminary Injunction
11/14/00	Defendants' Notice of Supplemental Authority
11/14/00	Motion To Intervene of the State Executive Committee of the Florida Democratic Party
11/14/00	Matt Butler's Petition To Intervene and Motion To Dismiss Complaint, or in the Alternative, To Deny Plaintiffs' Motion for Temporary Injunction
11/14/00	True Copy of DE 00-10 Deadline for Certification on County Results/Katherine Harris, Secretary of State
11/14/00	Court Exhibits 1, 2, 3 and 4
11/14/00	Appeal to District Court
11/15/00	Canvassing Board for Palm Beach County Florida Notice of Joinder of Appeal
11/15/00	Canvassing Board for Palm Beach County Fla Notice of Joinder of Appeal Original (Fax Copy Was Recorded)
11/16/00	Emergency Motion of Democratic Party of Fla and Vice President Al Gore To Compel Compliance with and for Enforcement of Injunction (with Exhibits)
11/16/00	DCA No:1D00-4467
11/16/00	Motion To Intervene Canvassing Board of Broward County
11/16/00	Notice of Supplemental Filing
11/16/00	Notice of Filing Supplemental Authority

Date	Description
11/16/00	Memorandum in Opposition to Movants Emergency Motion of Democratic Party of Fla and Vice President Al Gore To Compel Compliance with and for Enforcement of Injunction
11/16/00	Notice of Filing Order Dissolving Injunction, Requiring Certification of Returns, Permitting Manual Recount of Returns upon the Discretion of the Palm Beach County Elections Canvassing Commission, and Directions to the Secretary of State
11/16/00	Motion of Democratic Party of Florida and Vice President Albert Gore To Supplement the Record
11/16/00	Notice of Second Supplemental Filing
11/16/00	Defendant Katherine Harris' Memorandum of Law
11/17/00	Order Denying Emergency Motion To Compel Compliance with and for Enforcement of Injunction
11/17/00	Appeal to District Court
11/17/00	Intervenors' Appeal to District Court F&E
11/17/00	Certified Copy of Notice of Appeal Sent to DCA
11/17/00	Certified Copy of Notice of Appeal Sent to DCA
11/18/00	Appeal Record Prepared
11/18/00	Index
11/18/00	Record Delivered to SC
11/20/00	Supreme Court Order

Date	Description
11/20/00	Order Accepting Jurisdiction Setting Oral Argument and Setting Briefing Schedule
11/20/00	Stay Order
11/20/00	Notice of Substitution of Counsel
11/20/00	Appendix to Initial Brief of Albert Gore, Jr. and the Florida Democratic Executive Committee (Copy of Filing with the Supreme Court)
11/20/00	Joint Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party (Copy of Filing with Supreme Court)
11/20/00	Canvassing Board for Palm Beach County, Florida Notice of Joinder of Appeal
11/20/00	Canvassing Board for Palm Beach County, Florida Notice of Joinder of Appeal
11/20/00	Motion To Allow Demonstrative Exhibit of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party (Copy of Document Filed with Supreme Court)
11/21/00	Proceedings (Copy)
11/21/00	Appendix Joint Reply Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party (Copy)
11/21/00	Response to Motion To Modify Oral Argument Time Apportionment (Copy)
11/21/00	Reply Brief of Petitioners/Appellants Al Gore, Jr. and Florida Democratic Party (Copy)
11/21/00	DCA Order, The Above Cases Are Consolidated

Date	Description
11/21/00	DCA Order, On the Court's Own Motion, It Is Hereby Certified in Accordance with Florida Rule of Appellate Procedure 9.125 That This Appeal Requires Immediate Resolution by the Supreme Court of Florida Because the Orders on Appeal Present Issues Which Are of Great Public Importance
11/21/00	DCA No:1D00-4501
11/21/00	DCA No:1D00-4506
11/22/00	Supreme Court Ruling
11/22/00	Acknowledgment of New Case (Copy)

METROPOLITAN DADE COUNTY, FLORIDA
Office of the Supervisor of Elections

November 15, 2000

Honorable Katherine Harris
Secretary of State
8802, The Capitol
400 South Monroe Street
Tallahassee, FL 32399-0250

Dear Secretary Harris:

After a careful review of the written filings, exhibits and presentation of oral argument of the requesting party, the Democratic party, as well as the Republican party's response and all other interested persons, the Miami-Dade Canvassing Board exercised its discretion and unanimously voted to conduct a manual recount of three precincts selected by the requesting party comprising 1% of the vote as provided for pursuant to Florida Statute 102.166.

The Miami-Dade County Canvassing Board urges you to accept the Supplemental Certificate of Results for the Office of President of the United States. These supplemental votes are a result of the Canvassing Board's decision to hand count three precincts. The manual recount of the three precincts was completed at approximately 8:00 p.m. on November 14, 2000. The Supplemental Certificate of Results will be faxed to the Division of Elections prior to 2:00 p.m. on Wednesday, November 15, 2000 and an original certification will be sent to the Division of Elections such that it will be received by that office on November 16, 2000.

The Miami-Dade County Canvassing Board believes it is imperative that the votes for the Office of President of the United States contained in the Supplemental Certificate of Results be added to the vote totals of the Board's Certificate of Results dated November 9, 2000.

Please contact David C. Leahy, Supervisor of Elections for Miami-Dade County, at 305-375-3150 if you have any questions regarding this request or the Supplemental Certificate of Results.

Sincerely,

MIAMI-DADE CANVASSING BOARD

/s/
County Court Judge LAWRENCE D. KING
Chairperson

/s/
County Court Judge MYRIAM LEHR
Substitute Member

/s/
Supervisor of Elections DAVID C. LEAHY
Member

cc: L. Clayton Roberts, Director
Division of Elections

JENNIFER EDWARDS
SUPERVISOR OF ELECTIONS

Collier Government Complex
3301 Tamiami Trail East, Building B
Naples, Florida 34112-4902
Telephone: 941/774-6450
Fax: 941/774-9468
www.co.collier.fl.us

November 15, 2000 VIA FAX & FED EX

The Honorable Katherine Harris
Secretary of State
Florida Department of State
Division of Elections
The Capital, Room 1801
Tallahassee, Florida 32399

Honorable Katherine Harris,

On November 14, 2000, as Collier County Supervisor of Elections Employees were preparing the ballot envelopes of this November 7, 2000 General Election for storage, we performed a post election audit of all envelopes to confirm all envelopes were empty. During this audit, we found 24 ballots had not been removed from the envelope in which they were received, although accepted and opened prior to the election, but were not counted. These 24 ballots represent a cross section of voters of several political parties upon review of the unopened ballot envelopes.

An additional ballot was received October 18, 2000 and accepted. Upon opening, it was ascertained to be a ballot card for the first primary election. Upon further investigation of this ballot, it was determined that the voter had voted for the general election using a first primary ballot card.

We provide this for your information; we are <u>not</u> requesting a manual recount of ballots for this recent General Election. We do inquire if the Canvassing Board of Collier County Florida may provide an amended recount certification of Colliers ballots by merely adding these inadvertently omitted absentee ballots to the total ballot counts already certified and provided.

If this amended recount is approved, the count of these 25 ballots will take place on Friday, November 17, 2000 at 2 p.m. in the Elections Office, M.L. King Building, 3301 Tamiami Trail, Naples, Florida 34104. This will occur at the same meeting at which our overseas ballots will be canvassed, however, they will be certified separately.

Sincerely,

/s/
Jennifer J. Edwards
Supervisor of Elections
Collier County

CANVASSING BOARD
BROWARD COUNTY, FLORIDA
201 S.E. 6th Street
Room 6760
Ft. Lauderdale, FL 33301

November 15, 2000

The Honorable Katherine Harris
State of Florida
Secretary of State
The Capitol
Room 1801
Tallahassee, FL 32399-0250
Via facsimile – (850) 488-1768

RE: Request of Broward County Canvassing Board to Amend Certification of County Returns After November 14, 2000

Dear Secretary Harris:

This letter is in response to your November 14, 2000 memorandum in which you required the Broward County Canvassing Board (the "Board") to submit a written statement of facts and circumstances justifying an amended certification of county returns. The Board has concluded that the limited manual recount to date indicates an error in the vote tabulation which could affect the outcome of the election, requiring all manual recount of the ballots.

The Board states the following additional facts and circumstances that justify an amended certification:

1. Extremely large voter turnout, and the resulting ballots cast, dramatically increased the time required for the initial tabulation.

2. This Board, representing voters in the second largest county in Florida, needs additional time to complete all necessary tabulation, and should be afforded

more time than boards representing voters in less-populated counties.

3. The large number of ballots has created additional logistical problems, requiring that ballots be moved to an alternate location for further tabulation. The Supervisor's location can accommodate a very limited number of counting teams.

4. The Board has encountered significant periods of delay, including:

A. The actions of the Board have been materially impacted by numerous lawsuits, including lawsuits filed in state circuit courts in Broward County, Palm Beach County and Leon County, and in federal court in both the Southern District and Middle District of Florida.

B. The actions of the Board have been materially impacted by conflicting opinion letters issued by Cabinet officers. On November 13, 2000, an opinion letter was issued by the Director of the Division of Elections, on behalf of the Secretary of State. On November 14, 2000, a conflicting opinion letter was issued by the Office of the Attorney General. These opinion letters impacted the Board's decision-making process regarding a full manual recount and further impeded the Board's ability to proceed more expeditiously.

C. One of the members of the Board, Supervisor of Elections Jane Carroll, was out of state on a pre-planned family holiday and therefore unavailable from November 9, 2000 through November 12, 2000.

D. The Veterans' Day holiday, observed in Broward County by different governmental agencies on either November 10, 2000 or November 13, 2000, further limited the Board's ability to act.

E. The Board was required by state law to conduct an automatic recount prior to determining the necessity of a full manual recount.

Based on these facts and circumstances, the Board voted today to begin a full manual recount. The Board expects to complete the recount by 5:00 p.m. on Monday, November 20, 2000. In accordance with your memorandum, the Board will advise you in the future of any change in relevant facts and circumstances regarding this recount, including the estimated completion time.

Please feel free to contact me with any question or concerns.

Respectfully submitted,

/s/
Robert W. Lee
County Court Judge
Chair, Broward County Canvassing Board

November 15, 2000

The Honorable Katherine Harris
Secretary of State
The Capitol
Tallahassee, FL 32399-0250

RE: Amended certification of returns

Dear Secretary Harris:

This letter is in response to your request for a written statement of the facts and circumstances which would necessitate a change to be made in the final certification of the statewide vote based on the results of Palm Beach County's manual recount of all the ballots cast in Palm Beach County for the offices of President and Vice President.

The Palm Beach County Canvassing Board has conducted a machine recount of the ballots and a limited manual recount of one percent of the total votes cast in accordance with Section 102.166(4)(d), Florida Statutes. The limited manual recount produced different results than the machine recount. The machine recorded approximately 10,000 undervotes. As stated in the Canvassing Board's Petition for Extraordinary Writ, it elected to conduct a manual recount "[b]ecause the results could affect the outcome of the election." See, § 102.166(5), Fla. Stat.

On Sunday, November 12, 2000, the Canvassing Board voted to conduct a manual recount of all the ballots cast in Palm Beach County for the offices of President and Vice-President pursuant to the authority granted to it under Section 102.166(5)(c), Florida Statutes. As you are aware, the Canvassing Board also voted to seek advisory opinions from the Division of Elections and the Attorney General regarding the proper interpretation of Section 102.166(5), Florida Statutes. The opinions were conflicting: accordingly, the Canvassing Board is currently seeking to an adjudication by

the Florida Supreme Court to resolve the conflicting opinions on the question of whether the Canvassing Board may, under the above-referenced circumstances, conduct a manual recount of the votes cast for President and Vice President. The Canvassing Board has voted to suspend its manual recount pending the resolution of this issue and other issues by the Florida Supreme Court.

A manual recount of four precincts, which accounts for approximately one percent of the total votes cast in Palm Beach County, resulted in a difference in the vote totals. The 4695 ballots manually recounted in four precincts resulted in a total gain of 33 votes for Vice President Al Gore and 14 votes for Governor George W. Bush, which is a net gain of 19 votes for Vice President Al Gore. Clearly, the results of the manual recount could affect the outcome of this very close presidential election if the manual recounts in the other precincts also vary in this degree from the machine counts.

Sincerely,

/s/
The Honorable Charles Burton,
County Court Judge, 15th Judicial Circuit
Chairperson, Palm Beach County Canvassing Board

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

November 15, 2000

Honorable Charles Burton
County Court Judge
Chair, Palm Beach County Canvassing Commission
Palm Beach County Courthouse
West Palm Beach, Florida 33401

RE: Request of Palm Beach County Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Chairman Burton:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Palm Beach County Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in § 102.112, Florida Statutes. As the Board is aware, § 102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, § 102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000. I also am in receipt of your report filed with the Division of Elections.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion. There are no express statutory standards by which to

evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In Re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott, et. al. v. Harris, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the

voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (F1a. 4th DCA 1992).

Facts and Circumstances Alleged By Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts and circumstances set forth in your letter of today's date and assumed that they are true. The Board has alleged that it conducted a machine recount and a limited manual recount of one percent of the total votes cast and that the two recounts produced "different results than the machine recount." The Board has alleged that "the machine recorded approximately 10,000 undervotes." And, the Board alleged that it has received conflicting opinions from the Division of Elections and the Attorney General regarding the proper interpretation of § 102.166(5), Florida Statutes, and that the Board is seeking adjudication by the Florida Supreme Court to resolve the conflicting opinions on whether the Board may conduct a manual recount under the law. Finally, the Board alleged that the results of a manual recount could affect the outcome of the election. In its report filed with the Division of Elections, the Board responded in the negative to the question of whether the county "had any problems which occurred as a result of equipment malfunctions either at the precinct level or at a counting location." In this report, the

Board also noted that it would provide additional details regarding "difficulties or unusual circumstances encountered by an election board or canvassing board," and "problems which the canvassing board feels should be made a part of the official election record."

Application or Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Palm Beach County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged the possibility that the results of the manual recount *could* affect the outcome of the election if certain results obtain. However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the possibility of affecting the outcome of the election is enough to justify ignoring the statutory deadline. Furthermore, I find that the facts and circumstances alleged, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to § 102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

/s/
Katherine Harris
Secretary of State

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

November 15, 2000

Honorable Lawrence D. King
Chair, Miami-Dade Canvassing Board
Office of the Supervisor of Elections
Suite 1910
111 NW 1st Street
Miami, Florida 33128-1962

RE: Request of Miami-Dade Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Chairman King:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Miami Dade Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in § 102.112, Florida Statutes. As the Board is aware, § 102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, § 102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000. I am not in receipt of your report due to be filed with the Division of Elections.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion.

There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In Re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott, et al. v. Harris, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expec-

tation that the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Facts and Circumstances Alleged By Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts and circumstances set forth in your letter of today's date and assumed that they are true. The Board has alleged that it conducted a limited manual recount of one percent of the total votes cast with respect to the Office of the President of the United States, completed at approximately 8:00 p.m. on November 14, 2000. The Board also has alleged that it has voted to conduct a manual recount of six precincts with respect to votes cast in the race for Congressional District 22, and that this recount was scheduled to begin this morning. The Board has alleged no facts or circumstances in support of the manual recounts.

Application of Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with rea-

sonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Miami-Dade County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to §102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

/s/
Katherine Harris
Secretary of State

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

November 15, 2000

Honorable Robert W. Lee
County Court Judge
Chair, Broward County Canvassing Commission
201 S.E. 6th Street, Room 6760
Ft. Lauderdale, FL 33301

RE: Request of Broward County Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Chairman Lee:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Broward County Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in § 102.112, Florida Statutes. As the Board is aware, § 102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, § 102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion. There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In Re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott, et al. v. Harris, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (Fla. 4th DCA 1992).

Facts and Circumstances Alleged By Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts set forth in your report filed November 13, 2000, and your letter of today's date and assumed that they are true.

The Board states the following additional facts and circumstances that justify an amended certification:

1. Extremely large voter turnout, and the resulting ballots cast, dramatically increased the time required for the initial tabulation.

2. This Board, representing voters in the second largest county in Florida, needs additional time to complete all necessary tabulation, and should be afforded more time than boards representing voters in less-populated counties.

3. The large number of ballots has created additional logistical problems, requiring that ballots be moved to an alternate location for further tabulation. The Supervisor's location can accommodate a very limited number of counting teams.

4. The Board has encountered significant periods of delay, including:

A. The actions of the Board have been materially impacted by numerous lawsuits, including lawsuits filed in state circuit courts in Broward County, Palm Beach County and Leon County, and in federal court in both the Southern District and Middle District of Florida.

B. The actions of the Board have been materially impacted by conflicting opinion letters issued by Cabinet officers. On November 13, 2000, an opinion letter was issued by the Director of the Division of Elections, on behalf of the Secretary of State. On November 14, 2000, a conflicting opinion letter was issued by the Office of the Attorney General. These opinion letters impacted the Board's decision-making process regarding a full manual recount and further impeded the Board's ability to proceed more expeditiously.

C. One of the members of the Board, Supervisor of Elections Jane Carroll, was out of state on a pre-planned family holiday and therefore unavailable from November 9, 2000 through November 12, 2000.

D. The Veterans' Day holiday, observed in Broward County by different governmental agencies on either November 10, 2000 or November 13, 2000, further limited the Board's ability to act.

E. The Board was required by state law to conduct an automatic recount prior to determining the necessity of a full manual recount.

Additionally, the Board, in its report filed with the Division of Elections on November 13, 2000, responded in the negative to the question of whether the county "had any problems which occurred as a result of equipment malfunctions either at the precinct level or at a counting location." In this report, the Board stated that "2 precincts failed to have ballots in transfer case; ballots retrieved from locked boxes left at precinct." And, the Board responded in the negative to the question of whether the board knew of "any other problems which

the canvassing board feels should be made a part of the official election record."

Application of Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures. The Board has not alleged any facts or circumstances that suggest that Broward County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. The Board has alleged large voter turnout and logistical problems associated with that turnout. However, Broward County is a large county and high voter turnout was not unexpected. The Board also has alleged delay in the certification process associated with litigation, a family holiday by the Supervisor of Elections, and the Veterans' Day holiday. However, I find that these circumstances, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to §102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

/s/
Katherine Harris
Secretary of State

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

November 15, 2000

Honorable Jennifer Edwards
Supervisor of Elections
Collier County Canvassing Commission
Collier County Government
3301 Tamiami Trail East, Building B
Naples, Florida 34112-4902

RE: Request of Collier County Canvassing Board to Amend Certification of County Returns After November 14, 2000 Statutory Deadline

Dear Supervisor Edwards:

I am in receipt of your letter of today's date in which you submitted a written statement of facts and circumstances relative to the request of the Collier County Canvassing Board ("Board") to amend its certification of county election returns subsequent to the statutory deadline set forth in § 102.112, Florida Statutes. As the Board is aware, § 102.112, Florida Statutes, requires the Board to file its county election returns with the Department of State by 5 p.m. on the 7th day following the general election. Also, § 102.141(6) requires the Board to file at that time a report with the Division of Elections on the conduct of the election. That deadline expired at 5 p.m. yesterday, November 14, 2000. I also am in receipt of your report filed with the Division of Elections.

Notwithstanding that statutory deadline, the Honorable Terry P. Lewis, Circuit Judge, Second Judicial District, Leon County, entered an Order on November 14, 2000, directing me to withhold determination as to whether or not to ignore late-filed returns until I have given due consideration to all relevant facts and circumstances consistent with the sound exercise of discretion.

There are no express statutory standards by which to evaluate the facts and circumstances associated with a late filing of county election returns. Thus, I have concluded that the appropriate standards for determining whether to exercise discretion to accept or reject election results filed subsequent to the statutory deadline are those standards utilized by the Florida courts in deciding whether or not to uphold a challenged election. Those criteria are as follows:

Facts & Circumstances Warranting Waiver of Statutory Deadline

1. Where there is proof of voter fraud that affects the outcome of the election. In Re Protest of Election Returns, 707 So. 2d 1170, 1172 (Fla. 3d DCA 1998); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 509 (Fla. 4th DCA 1992).

2. Where there has been a substantial noncompliance with statutory election procedures, and reasonable doubt exists as to whether the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

3. Where election officials have made a good faith effort to comply with the statutory deadline and are prevented from timely complying with their duties as a result of an act of God, or extenuating circumstances beyond their control, by way of example, an electrical power outage, a malfunction of the transmitting equipment, or a mechanical malfunction of the voting tabulation system. McDermott, et al. v. Harris, Case No. 00-2700, (Second Cir.), November 14, 2000, Order of Judge Terry P. Lewis.

Facts & Circumstances Not Warranting Waiver of Statutory Deadline

1. Where there has been substantial compliance with statutory election procedures and the contested results relate to voter error, and there exists a reasonable expectation that the certified results expressed the will of the voters. Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998).

2. Where there exists a ballot that may be confusing because of the alignment and location of the candidates' names, but is otherwise in substantial compliance with the election laws. Nelson v. Robinson, 301 So. 2d 508, 511 (Fla. 2d DCA 1974) ("mere confusion does not amount to an impediment to the voters' free choice if reasonable time and study will sort it out.")

3. Where there is nothing "more than a mere possibility that the outcome of the election would have been effected." Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508, 510 (F1a. 4th DCA 1992).

Facts and Circumstances Alleged By Board

For purposes of determining whether to exercise my discretion to accept or reject late-filed election returns, I have considered all of the facts and circumstances set forth in your letter of today's date and assumed that they are true. The Board asks whether it may provide an amended recount certification of Collier's ballots by adding 25 inadvertently omitted ballots to the total ballot counts already certified and provided. In its report filed with the Division of Elections, the Board reported that addressed several complaints of equipment malfunction. In all cases the complaints were investigated, and the malfunctions were either corrected or the machines were determined to be functioning correctly. The Board reported that there were no difficulties or unusual circumstances encountered by the elections board or the canvassing board. They Board also reported that a number of individuals reported to vote under the impression that they had registered to vote at the Department of Motor Vehicles, but that these voters' applications were not on file with the supervisor of election.

Application of Criteria to Alleged Facts and Circumstances

The Board has not alleged any facts or circumstances that suggest the existence of voter fraud. The Board has not alleged any facts or circumstances that suggest that there has been substantial noncompliance with the state's statutory election procedures, coupled with reasonable doubt as to whether the certified results expressed the will of the voters. The Board has not alleged any facts or circumstances that suggest that Collier County has been unable to comply with its election duties due to an act of God, or other extenuating circumstances that are beyond its control. Rather, the Board has alleged that 25 ballots were mistakenly not counted. I find that these circumstances, standing alone, do not rise to the level of extenuating circumstances that justify a decision on my part to ignore the statutory deadline imposed by the Florida Legislature.

For the above-described reasons, I hereby decline to exercise any authority I may possess pursuant to § 102.112, Florida Statutes, to accept election results reported by the Board after the statutory deadline of 5 p.m., November 14, 2000.

Respectfully submitted,

/s/
Katherine Harris
Secretary of State

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

DIVISION OF ELECTIONS

M E M O R A N D U M

TO: Supervisors of Elections
Broward, Miami-Dade and
Palm Beach County

FROM: Clay Roberts, Director
Division of Elections

DATE: November 14, 2000

SUBJECT: Amended certification of returns

As of 5 p.m. today, the Division of Elections has received certification of returns from all 67 Florida counties. The usual practice of the state elections canvassing commission is to finally certify these returns as soon as the compilations are completed by the staff of the division. However, we understand your county may plan to conduct a manual recount continuing beyond today's 5 p.m. deadline.

Leon County Circuit Court Judge Terry Lewis confirmed today that the Secretary of State has the discretion to consider any request to amend certification of county returns after the deadline. In order to properly exercise that discretion, the Secretary requires that you forward to her by 2 p.m. Wednesday, November 15, 2000 a written statement of the facts and circumstances that cause you to believe that a change should be made to what otherwise would be the final certification of the statewide vote, composed of the tallies received by 5 p.m. today, plus the total of the votes received from overseas ballots received by the counties by midnight on Friday.

As always, please call us if you have any questions.

STATE OF FLORIDA

OFFICE OF ATTORNEY GENERAL

ROBERT A. BUTTERWORTH

November 14, 2000

The Honorable Charles E. Burton 00-65
Chair, Palm Beach County Canvassing Board
County Courthouse
West Palm Beach, Florida 33401

Dear Judge Burton:

On behalf of the Palm Beach County Canvassing Board, you have asked this office's opinion as to the meaning of "error in voting tabulation which could affect the outcome of" an election as that phrase is used in section 102.166(5), Florida Statutes.

I am answering your request fully mindful that just yesterday the Division of Elections rendered Division of Elections Opinion 00-11 to the Chairman of the Republican Party, interpreting the duties of a county canvassing board pursuant to section 102.166(5), Florida Statutes.[1] Because the Division of Elections opinion is so clearly at variance with the existing Florida statutes and

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[1] The validity of the opinion of the Division of Elections is questionable since it appears to exceed the authority granted to the division by Florida law. Section 106.23(2), Florida Statutes, provides the division with the authority to render advisory opinions interpreting the election code to, among others, a political party relating to actions such party has taken or proposes to take. Division of Elections Opinion 00-11, however, erroneously seeks to advise a political party about the responsibilities of the supervisor of elections and local canvassing board under section 102.166(5).

case law, and because of the immediate impact this erroneous opinion could have on the on-going recount process, I am issuing this advisory opinion.

Section 102.166(4), Florida Statutes, permits a local canvassing board, upon request of a candidate or political party, to authorize a manual recount to include at least three precincts and at least 1 percent of the total votes cast for such candidate.[2] Section 102.166(5), Florida Statutes, provides "[i]f the manual recount indicates an error in vote tabulation which could affect the outcome of the election, the county canvassing board shall" among other options, manually recount all ballots.

Division of Election Opinion 00-11 concludes that the language "error in the vote tabulation" in section 102.166(5), Florida Statutes, refers only to a counting error in the vote tabulation system. The opinion concludes that the inability of a voting system to read an "improperly marked marksense or improperly punched punchcard ballot" is not an "error in the voter tabulation system" and would not, therefore, trigger a recount of all ballots.

The division's opinion is wrong in several respects.

The opinion ignores the plain language of the statute which refers not to an error in the vote tabulation system but to an error in the vote tabulation. The Legislature has used the terms "vote tabulation system" and "automatic tabulating equipment" elsewhere in section 102.166, Florida Statutes, when it intended to refer to the system rather than the vote count. Yet the division, by reading "vote tabulation" and "vote tabulation sys-

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[2] *See*, s. 102.166(4)(d), Fla. Stat., stating that the person requesting the recount "shall choose three precincts to be recounted."

tem" as synonymous, blurs the distinctions that the Legislature clearly delineated in section 102.166.[3]

The error in vote tabulation might be caused by a mechanical malfunction in the operation of the vote-counting system, but the error might also result from the failure of a properly functioning mechanical system to discern the choices of the voters as revealed by the ballots. The fact that both possibilities are contemplated is evidenced by section 102.166(7) and (8), Florida Statutes. While subsection (8) addresses verification of tabulation software, subsection (7) provides procedures for an examination of the ballot by the canvassing board and counting teams to determine the voter's intent.

The division's opinion, without authority or support, effectively nullifies the language of section 102.166(7), Florida Statutes. Nothing in subsection (7) limits its application to the recount of all ballots. Rather, the procedures for a manual recount in subsection (7) equally apply to the initial sampling manual recount authorized in section 102.166(4)(d). Section 102.166(7)(b) states:

> If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent.

Yet under the division's interpretation, such language is rendered superfluous. It is fundamental principle of statutory construction that statutory language is not to be assumed to be surplusage; rather a statute is to

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[3] *See, e.g., Department of Professional Regulation, Board of Medical Examiners v. Durrani*, 455 So. 2d 515 (Fla. 1st DCA 1984) (legislative use of different terms in different portions of same statute is strong evidence that different meanings were intended).

be construed to give meaning to all words and phrases contained within statute.[4]

Section 102.166(7) clearly recognizes that an examination by a person of the ballot will occur to determine whether the voter complied with the statutory requirement, *i.e.*, marked the marksense or punched the punchcard ballot. The statutes do not specify how a punchcard must be punched. Clearly, there may be instances where a punchcard or marksense ballot was not punched or marked in a manner in which the electronic or electro-mechanical equipment was able to read the ballot. Such a deficiency in the equipment in no way compromises the voter's intent or the canvassing board's ability to review the ballot and determine the voter's intent. In fact, section 101.5614(5) and (6), Florida Statutes, contemplate that such an examination will occur. Section 101.5614(6) provides that the ballot will not be counted if it is impossible to determine the elector's choice or the elector marks more than one name than there are persons to be elected.

Clearly, the manual count of the sampling precincts which reveals a discrepancy between votes counted by the automatic tabulating equipment and valid ballots which were not properly read by the equipment but which constitute ballots in which the voter complied with the statutory requirements and in which the voter's intent may be ascertained, constitutes an "error in vote tabulation." If the error is sufficient that it could affect

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[4] *See, Terrinoni v. Westward Ho!*, 418 So. 2d 1143 (Fla. 1st DCA 1982); *Pinellas County v. Woolley*, 189 So. 2d 217 (Fla. 2d DCA 1966); Ops. Att'y Gen. Fla. 95-27 (1995); 91-16 (1991) (operative language in a statute may not be regarded as surplusage); 91-11 (statute must be construed so as to give meaning to all words and phrases contained within that statute).

the outcome of the election, then a manual recount of all ballots may be ordered by the county canvassing board.

The division's opinion fails to acknowledge the longstanding case law in Florida which has held that the intent of the voters as shown by their ballots should be given effect. Where a ballot is marked so as to plainly indicate the voter's choice and intent, it should be counted as marked unless some positive provision of law would be violated.[5]

As the state has moved toward electronic voting, nothing in this evolution has diminished the standards first articulated in such decisions as *State ex rel. Smith v. Anderson*[6] and *State ex rel. Nuccio v. Williams*[7] that the intent of the voter is of paramount concern and should be given effect if the voter has complied with the statutory requirement and that intent may be determined. For example, if a voter has clearly, physically penetrated a punchcard ballot, the canvassing board has the authority to determine that the voter's intention is clearly expressed even though such puncture is not sufficient to be read by automatic tabulating equipment.

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5 *See, State ex rel. Smith v. Anderson*, 8 So. 1 (Fla. 1890); *Darby v State*, 75 So. 411 (Fla. 1917); *State ex rel. Nuccio v. Williams*, 120 So. 310 (F1a. 1929) (in performing their duty of counting, tabulating, and making due return of ballots cast in an election, the inspectors may, in some cases of ambiguity or apparent uncertainty in the name voted for, determine, from the fact of the ballot as cast, the person for whom a vote was intended by the voter).

6 8 So. 1 (Fla. 1890).

7 120 So. 310 (Fla. 1929).

In *State ex rel. Carpenter v. Barber*,[8] the Court stated:

> The intention of the voter should be ascertained from a study of the ballot and the vote counted, if the will and intention of the voter can be determined, even though the cross mark 'X' appears before or after the name of said candidate. *See Wiggins, Co. Judge, v. State ex rel. Drane*, 106 Fla. 793, 144 So. 62; *Nuccio v. Williams*, 97 Fla. 159, 120 So. 310; *State ex rel. Knott v. Haskell*, 72 Fla. 176, 72 So. 651.

The Florida Statutes contemplate that where electronic or electromechanical voting systems are used, no vote is to be declared invalid or void if there is a clear indication of the intent of the voter as determined by the county canvassing board.[9]

In light of the plain language of section 102.166(5), Florida Statutes, authorizing a manual recount of all ballots when the sampling manual recount indicates an error in vote tabulation which could affect the outcome of the election and the general principles of election law, I must express my disagreement with the conclusions reached in Division of Election Opinion 00-11. Rather I am of the opinion that the term "error in voter tabulation" encompasses a discrepancy between the number of votes determined by a voter tabulation system and the

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8 198 So. 49, 51 (Fla. 1940).

9 *See, Wiggins v. State ex rel. Drane*, 144 So. 62, 63 (Fla. 1932) (separate tabulation and return of what may be deemed regular ballots does not mean that only regular ballots are to be counted; if the marking of the ballot should be irregular, but the voter casting such ballot has clearly indicated by an X-mark the candidate of his choice, the ballot should be counted as intended).

number of votes determined by a manual count of a sampling of precincts pursuant to section 102.166(4), Florida Statutes.

Sincerely,

/s/
Robert A. Butterworth
Attorney General

COUNTY COURT
PALM BEACH COUNTY FLORIDA

Chambers of
Charles E. Burton
County Court Judge

County Courthouse
West Palm Beach, Florida 33401
Phone

November 13, 2000

Clay Roberts, Director
Division of Elections
1801 The Capitol
Tallahassee, Florida 32399

RE: Request for Advisory Opinion

Dear Mr. Roberts:

I have been authorized by the Palm Beach County Canvassing Board to request an opinion from your office on the following issues:

1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation which could affect the outcome of" an election within the meaning of Section 102.166(5), Florida Statutes thereby enabling the canvassing board to request a manual recount of the entire county, or are "errors" confined to errors in tabulation system/software?

2. May a county canvassing board do a partial certification of the votes pursuant to Section 102.151, Florida Statutes for the November 7, 2000 election that excludes the votes for the candidates for the presidential election which will be certified by the county canvassing board at a later date?

A memorandum of law follows.

MEMORANDUM OF LAW

Question 1.

Section 102.166(5) provides:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

See also, Broward County Canvassing Board v. Hogan, 607 So. 2d 508 (Fla. 4th DCA 1992) (stating "the statutes clearly leave the decision to conduct a manual recount within the discretion of the board.")

The Palm Beach County Canvassing Board has voted to conduct a manual recount of the votes for the presidential election based on Section 102.166(5), Florida Statutes.

Question 2.

Section 102.151, Florida Statutes does not indicate whether a county canvassing board may certify the votes for less than all of the elections held on the November 7, 2000. The Palm Beach County Canvassing Board would like to exclude the votes for the presidential election based on an ongoing manual recount of the ballots for that election.

Respectfully submitted,

/s/
Judge Charles Burton
Chairperson, Palm Beach County Canvassing Board

cc: Denise Dytrych, Palm Beach County Attorney

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

DIVISION OF ELECTIONS

November 13, 2000

The Honorable Charles E. Burton
Chairperson
Palm Beach County Canvassing Board
West Palm Beach, Florida

DE 00-10
Deadline for Certification
on County Results
§§ 102.111 and 102.112,
Fla. Stat.

Dear Judge Burton:

This is in response to your request for an opinion relating to sections 102.111 and 102.112, Florida Statutes. You are chairperson of the Palm Beach County Canvassing Boards and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has the authority to issue an opinion to you.

You state that the Palm Beach County Canvassing Board voted to have a manual recount of all ballots cast in the presidential election. Further, you state that the manual recount will not be completed by 5:00 p.m. of the seventh day following the election as provided in sections 102.11 and 102.112 Florida Statutes. Essentially you ask:

1. What effect will the provisions of section 102.111, Florida Statutes, when read in conjunction with section 102.112, Florida Statutes, have on the votes cast in the presidential election by the citizens of Palm Beach County?

2. May the board certify all other election results to the Department of State while the manual recount continues for the Presidential election?

In response to your first question, if the Palm Beach County Canvassing Board fails to certify the county returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election, the votes cast in Palm Beach County will not be counted in the certification of the statewide results.

Section 102.111, Florida Statutes, is explicitly mandatory. It provides, "[i]f the county returns are not received by the Department of State by 5 p.m. on the 7th day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified."

Section 102.112, Florida Statutes, provides in pertinent part that returns must be filed by 5 p.m. on the 7th day following the first primary and general election. Further, if the returns are not received by the department by the time specified, such returns may be ignored and the results on file at the time may be certified by the department. This section contemplates unforeseen circumstances not specifically contemplated by the legislature. Such unforeseen circumstances might include a natural disaster such Hurricane Andrew, where compliance with the law would be impossible. But a close election, regardless of the identity of the candidates, is not such a circumstance. The legislature obviously specifically contemplated close elections in that the law provides for automatic recounts, protests, and manual recounts. It also plainly states when this process must end.

Therefore, absent such unforeseen circumstances, returns from the county must be received by the Elections Canvassing Commission by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.

The answer to your second question is yes, the county canvassing board may certify other election results to the Department of State while the manual recount continues for the presidential election.

SUMMARY

Absent such unforeseen circumstances such as a natural disaster, returns from the county must be received by the Elections Canvassing Commission by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results. The county canvassing board may certify other election results to the Department of State while the manual recount continues for the presidential election.

Sincerely,

/s/
L. Clayton Roberts
Director, Division of Elections

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

DIVISION OF ELECTIONS

November 13, 2000

Mr. Al Cardenas
Chairman
Republican Party of Florida
Post Office Box 311
Tallahassee, Florida 32302

DE 00-11
Definition of Error in
Vote Tabulation
§ 102.166(5), Fla. Stat.

Dear Mr. Cardenas:

This is in response to your request for an opinion relating to section 102.166(5), Florida Statutes. You are the Chairman for the Republican Party of Florida and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you. You ask:

1. What is the meaning of the term "error in the vote tabulation" as used in section 102.166(5), Florida Statutes?
2. What is the meaning of "affecting the outcome of the election" as used in section 102.166(5), Florida Statutes?
3. What manner of "error" and what type and/or degree of effect on the outcome would serve as a lawful predicate for a manual recount of all ballots under section 102.166(5)(c), Florida Statutes?

Your questions involve the interpretation of election laws and can be answered with an advisory opinion. Section 102.166(5), Florida Statutes, provides in pertinent part that if the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots.

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. The inability of a voting systems to read an improperly marked marksense or improperly punched punchcard ballot is not a "error in the vote tabulation" and would not trigger the requirement for the county canvassing board to take one of the actions specified in subsections 102.155(5)(a) through (c), Florida Statutes.

An error that could "affect the outcome of the election" is an error of a magnitude sufficient to make a difference as to which candidate wins the election.

SUMMARY

An "error in the vote tabulation," means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. An error that could "affect the outcome of the election" is an error of a magnitude sufficient to make a difference as to which candidate wins the election.

Sincerely,

/s/
L. Clayton Roberts
Director, Division of Elections

DE 00-12
Manual Recount Procedures

November 13, 2000

§ 102.166, Fla. Stat.

TO: The Honorable Jane Carroll
Broward County Supervisor of Elections
Post Office Box 029001
Ft. Lauderdale, Florida 33302-9001

Dear Ms. Carroll:

This is in response to your request for an advisory opinion concerning manual recount procedures. You are the Supervisor of Elections for Broward County and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you. You ask:

> If a county canvassing board authorizes a manual recount of ballots of the presidential election pursuant to section 102.166(4)(c), Florida Statutes, and determines that the number of votes for one or more candidates changes and such changes are due to voter errors (such as failing to properly follow voting procedures), is the board authorized to conduct a manual recount of all ballots of the remainder of the county?

The answer to your question is no. Section 102.166(5), Florida Statutes, provides that if the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots.

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punch-

card ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Voter error is not an "error in the vote tabulation." Therefore, the county canvassing board is not authorized to conduct a manual recount of the remainder of the county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes.

SUMMARY

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punch-card ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Voter error is not an "error in the vote tabulation." Therefore, the county canvassing board is not authorized to conduct a manual recount of the remainder of the county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes.

Sincerely,

/s/
L. Clayton Roberts
Director, Division of Elections

Prepared by:
Kristi Reid Bronson
Assistant General Counsel

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State
DIVISION OF ELECTIONS

November 13, 2000

The Honorable Charles E. Burton
Chairperson
Palm Beach County Canvassing Board
Palm Beach County Courthouse
West Palm Beach, Florida 33401

DE 00-13
Manual Recount Procedures and
Partial Certification of County Returns
§§ 102.166(5) and 102.151, Fla. Stat.

Dear Judge Burton:

This is in response to your request for an opinion. You are chairperson of the Palm Beach County Canvassing Board and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has the authority to issue an opinion to you. Essentially, you ask:

1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation" that could affect the outcome of an election within the meaning of section 102.166(5), Florida Statutes, thereby enabling the canvassing board to manually recount ballots for the entire county.

2. May a county canvassing board do a partial certification of the votes pursuant to section 102.151, Florida Statutes, for the November 7, 2000 election that excludes the votes for the candidates of the presidential election?

With regard to your first question, section 102.166(5), Florida Statutes, provides that if the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots.

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Therefore, unless the discrepancy between the number of votes determined by the tabulation system and by the manual recount of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes.

With regard to your second question, the answer is yes. The county canvassing board may do a partial certification of the votes pursuant to section 102.151, Florida Statutes, for the November 7, 2000 election that excludes the results of the presidential election.

SUMMARY

An "error in the vote tabulation" means a counting error in which the vote tabulation system fails to count properly marked marksense or properly punched punchcard ballots. Such an error could result from incorrect election parameters, or an error in the vote tabulation and reporting software of the voting system. Therefore, unless the discrepancy between the number of votes determined by the tabulation system and by the manual re-

count of four precincts is caused by incorrect election parameters or software errors, the county canvassing board is not authorized to manually recount ballots for the entire county nor perform any action specified in section 102.166(5)(a) and (b), Florida Statutes. The county canvassing board may do a partial certification of the votes pursuant to section 102.151, Florida Statutes, for the November 7, 2000 election that excludes the results for the presidential election.

Sincerely,

/s/
L. Clayton Roberts
Director, Division of Elections

Prepared by:
Kristi Reid Bronson
Assistant General Counsel

FLORIDA DEPARTMENT OF STATE
Katherine Harris
Secretary of State

STATEMENT OF KATHERINE HARRIS, SECRETARY OF STATE OF FLORIDA

For Immediate Release **November 13, 2000**

I am issuing this statement to ensure there are no misunderstandings with respect to the statutory schedule for completing the presidential election in Florida. To that end, I met this morning with representatives of the campaigns of Vice President Al Gore and Governor George Bush, and I communicated by facsimile transmission with the Supervisors of Elections in each of Florida's 67 counties.

The electoral process is a balance between the desire of each individual voter to have his or her intended vote recorded and the right of the public to a clear, final result within a reasonable time. It is the duty of the Florida legislature to strike that balance, and it has done so. In order to serve the interests of individual voters and the candidates who seek elective office, the law provides for automatic recounts in extremely close elections, methods for protesting elections, and procedures for petitioning for, and conducting, manual recounts. And in order to effectuate the public's right to clarity and finality, the law unambiguously states when the process of counting and recounting the votes cast on election day must end.

For this election, that time is 5 PM, November 14, which is tomorrow.

Section 102.112, Florida Statutes, provides that the county canvassing board must certify the county returns by 5 PM on the 7th day following the general election. The performance of this duty is mandatory; there are no exceptions provided in the law. In fact, a $200 a day

personal fine is imposed on members of the county canvassing board for failing to meet this deadline.

In this context, I am very aware that a few counties are conducting or contemplating additional recounts in the presidential election. In order to assist them in continuing their recounts as long as the law allows, I am dispatching personnel from my office to the offices of the Supervisors of Elections in every county that does not have a certified return on file in my office at the close of business today. They will remain in the offices of those Supervisors of Elections until 5 PM tomorrow in order to be available to officially receive the certified returns of that county until the last moment, thus providing the maximum possible time for recounting and certification.

As previously stated, it is the duty of the county canvassing board – and the county canvassing board alone – to certify the returns from that county by 5 PM tomorrow. If the certification is not in the possession of the Florida Department of State at that time, the law provides that the votes cast in that county will not be counted in the certification of the statewide results.

Again, Section 102.112, Florida Statutes, which deals with the duties of the county canvassing board, provides, "If the returns are not received by the time specified, such returns may be ignored and the results on file at that time may be certified by the department." Section 102.111, Florida Statutes, is explicitly mandatory. It provides, "If the county returns are not received by the department by 5 PM on the 7th day following an election, all missing counties shall be ignored, and the results on file shall be certified."

Florida law does not provide any date for return certifications other than tomorrow at 5 PM, and it does not provide any penalties for noncompliance other than the fines mentioned above and the disallowance of the entire uncertified vote of the defaulting county. Any discretion vested in me by the legislature in this regard

vested in me by the legislature in this regard is necessarily limited to circumstances not specifically contemplated by the legislature in the law. Such unforeseen circumstances might include a natural disaster such as Hurricane Andrew, where compliance with the law would be impossible. But a close election, regardless of the identity of the candidates, is not such a circumstance. The legislature obviously specifically contemplated close elections; the law provides for automatic recounts, protests, and manual recounts—and it plainly states when this process must end. Therefore, I will adhere to the date and penalties that are provided for Florida law.

With regard to the status of overseas absentee ballots, they must have been executed as of last Tuesday. They must bear a foreign postmark as provide [*sic*] in Section 101.62(7), and they must be received by the Supervisors of Elections by midnight Friday. They are not required, however, to be postmarked on or prior to last Tuesday.

I will today ask the Supervisors of Elections to make plans with their canvassing boards to count and certify the relatively few remaining overseas ballots Friday night, or by no later than Saturday morning. I will further ask them to transmit facsimile copies of those certifications to my office by noon Saturday as permitted by applicable case law. I anticipate that the state Elections Canvassing Commission, composed of the Secretary of State, the Commissioner of Agriculture, and the Director of the Division of Elections, will officially certify the results of the presidential election in Florida on Saturday afternoon.

In summary, every county must have official certifications of the voting returns from last Tuesday delivered to the Florida Department of State by 5 PM tomorrow, or those returns will not be included in the statewide canvass. It is my expectation that overseas absentees will be counted and certified by each county canvassing board no later than Saturday morning. Therefore, I an-

ticipate that the presidential election in Florida will be officially certified by Saturday afternoon, barring judicial intervention.

No county canvassing board has ever disenfranchised all the voters of its county by failing to do their legal duty to certify returns by the date specified in the law. I am confident that no county canvassing board will do so in this election.

Contact: Ben McKay. 850-414-5502

County Court
Palm Beach County Florida

Chambers of
Charles E. Burton
County Court Judge

County Courthouse
West Palm Beach, Florida 33401
Phone

November 13, 2000

Honorable Robert A. Butterworth
Attorney General
400 Monroe Street
Tallahassee, Florida 32399

RE: Request for Attorney General Opinion

Dear General Butterworth:

I have been authorized by the Palm Beach County Canvassing Board to request an opinion from your office on the following issues:

1. Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation which could affect the outcome of" an election within the meaning of Section 102.166(5), Florida Statutes thereby enabling the canvassing board to request a manual recount of the entire county, or are "errors" confined to errors in tabulation system/software?

2. May a county canvassing board do a partial certification of the votes pursuant to Section 102.151, Florida Statutes for the November 7, 2000 election that excludes the votes for the candidates for the presidential election which will be certified by the county canvassing board at a later date?

A memorandum of law follows.

MEMORANDUM OF LAW

Question 1.

Section 102.166(5) provides:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

See also, Broward County Canvassing Board v. Hogan, 607 So. 2d 508 (Fla. 4th DCA 1992) (stating "the statutes clearly leave the decision to conduct a manual recount within the discretion of the board.")

The Palm Beach County Canvassing Board has voted to conduct a manual recount of the votes for the presidential election based on Section 102.166(5), Florida Statutes.

Question 2.

Section 102.151, Florida Statutes does not indicate whether a county canvassing board may certify the votes for less than all of the elections held on the November 7, 2000. The Palm Beach County Canvassing Board would like to exclude the votes for the presidential election based on an ongoing manual recount of the ballots for that election.

Respectfully submitted,

/s/
Judge Charles Burton
Chairperson, Palm Beach County Canvassing Board

cc: Denise Dytrych, Palm Beach County Attorney
Katherine Harris, Secretary of State

COUNTY COURT
PALM BEACH COUNTY FLORIDA

November 12, 2000

Clay Roberts, Director
Division of Elections
1801, The Capitol
Tallahassee, FL 32399

Dear Mr. Roberts:

Pursuant to F.A.C. 1S-2.010, I am writing to you as Chairperson of the Palm Beach County Canvassing Board to seek an advisory opinion on certain actions contemplated by the board.

By way of history, the machine vote counters were tested on November 3, 2000, before and after the election on November 7, 2000; before and after the recount on November 8, 2000, and before and after the recount on November 12, 2000. Each time the test revealed no errors. In addition, the board also conducted a manual recount of one percent of the vote. As to each tally of votes, different vote totals were obtained. On November 12, 2000, the board voted to have a county wide manual recount of all ballots cast in the Presidential election.

Because the board voted to have a county wide manual recount of all ballots cast in the Presidential election, and while this manual recount will take place as expeditiously as possible, the manual recount cannot be completed by 5:00 p.m. of the seventh day following the election. Therefore, what effect can the provisions of F.S. 102.11(1), which states that if the county returns are not timely received they "shall be ignored", when read in conjunction with F.S. 102.112(1), which states that the county returns "may be ignored", have on the votes cast in the Presidential election by the citizens of Palm Beach County? Further, if the Department of State or

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or the Elections Canvassing Commission has the discretion to extend the filing deadline for certified returns, what factors would it consider in making its decision?

In addition, may the board certify all other election results to the Department of State while the manual recount continues for the Presidential election?

Due to the fact that the board is meeting on November 13, 2000 at 10:00 a.m., a prompt response would be appreciated.

Very truly yours,

/s/
Charles E. Burton
County Court Judge
Chairperson, P.B. County Canvassing Board

Florida Department of State – Division of Elections

Voter Turnout, November 7, 2000

** UNOFFICIAL RESULTS **

County	Registered Voters	Turnout	Percent	Presidential Votes	No Votes	Percent No Votes
			• • •			
Broward	887,764	588,007	66.2%	573,396	14,611	2.48%
			• • •			
Collier	123,572	95,325	77.1%	92,141	3.184	3.34%
			• • •			
Miami-Dade	896,912	654,044	72.9%	625,443	28,601	4.37%
			• • •			
Palm Beach	656,694	462,588	70.4%	433,186	29,402	6.36%
			• • •			
Volusia	260,572	184,153	70.7%	183,653	500	0.27%
			• • •			
Totals	8,752,717	6,138,770	70.1%	5,958,643	180,127	2.93%

(A)

Supreme Court, U.S.
FILED
NOV 28 2000
CLERK

NOV 28 2000

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

3. What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Governor George W. Bush, as candidate for President; Katherine Harris, as Secretary of State, State of Florida; Katherine Harris, Bob Crawford, and Laurence C. Roberts, as members of the Florida Elections Canvassing Commission; Matt Butler; Palm Beach County Canvassing Board; Broward County Canvassing Board; Broward County Supervisor of Elections; Robert A. Butterworth, as Attorney General, State of Florida; Florida Democratic Party; and Vice President Albert Gore, Jr., as candidate for President.

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BRIEF FOR PETITIONER

On November 7, 2000, the Nation's quadrennial presidential election was conducted throughout the United States. The apparent results of the State-by-State returns indicate that the candidate who receives the Electoral College votes of Florida will, on December 18, 2000, receive a majority of the votes of the electors appointed by the various States and will thereafter become the next President of the United States.

On November 21, 2000, the Supreme Court of Florida issued an equitable decree altering Florida's methods and timetables for the determination of controversies regarding the appointment of presidential electors. That decree has interjected unwarranted but serious questions concerning the selection of Florida's presidential electors that threaten to undermine and cloud the outcome of the election in that State. Because that equitable decree is inconsistent with federal law and the Constitution of the United States, petitioner respectfully prays that this Court vacate the judgment below.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (Pet. App. 1a-38a) is not yet reported. The orders of the Circuit Court for the County of Leon, Florida (Pet. App. 42a-43a & 44a-50a) are not reported.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 21, 2000. The petition for a writ of certiorari was filed on November 22, 2000 and granted on November 24, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

The judgment below amounts to the entry of a permanent injunction against state election officials and is therefore "final" for purposes of this Court's certiorari

jurisdiction. *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). Petitioner expressly raised below the federal questions on which the Court has granted certiorari. *See* Pet. 9-10. The Florida Supreme Court's failure to address petitioner's federal claims, and its assertion that "[n]either party has raised as an issue on appeal the constitutionality of Florida's election laws" (Pet. App. 10a n.10), are therefore no barrier to review by this Court. *Street v. New York*, 394 U.S. 576, 583 (1969); *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956). State courts cannot evade this Court's review by failing to discuss federal questions. *Chapman v. Goodnow's Adm'r*, 123 U.S. 540, 548 (1887).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pursuant to this Court's Rule 24.1(f), the pertinent constitutional and statutory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

On Tuesday, November 7, 2000, the citizens of the several States, including Florida, cast their votes for the electors for President and Vice President of the United States. The official initial count of the ballots cast in Florida showed that the Republican Party candidates, Governor George W. Bush and Secretary Dick Cheney, received more votes than their principal opponents in the election, Democratic Party candidates Vice President Albert Gore and Senator Joseph Lieberman, subject to the counting of overseas absentee ballots. Because the margin of victory was less than one-half of one percent, however, a statewide recount commenced. *See* Fla. Stat. § 102.141(4). The statewide recount, and the tabulation of overseas absentee ballots on November 18, 2000, while reflecting slightly different tabulation totals, each confirmed that Governor Bush and Secretary Cheney received the most votes.

On November 8, 2000, the Florida Democratic Party sought additional recounts by hand in four heavily populated, predominantly Democratic counties. The Florida Supreme Court thereafter issued a decree extending by twelve days the seven day statutorily imposed deadline to submit certified vote tabulations including the results of these recounts. Pursuant to that extended deadline, on November 26, the totals were again tabulated, and Governor Bush and Secretary Cheney were again determined to have received the most votes. The Florida Elections Canvassing Commission proceeded on November 26, 2000, to certify them as the victorious candidates in the statewide presidential election. Those certified results include tabulations that reflect manual recounts that were conducted solely as a result of the Florida Supreme Court decision under review here.

Vice President Gore and Senator Lieberman have filed a lawsuit in Leon County Circuit Court to contest the certified election results. The Florida Supreme Court's decision, which conflicts with both federal statutes and the federal Constitution, will thus continue to affect, and has the theoretical potential to change, the outcome of the presidential election in Florida, and thus the Nation. Reversal by this Court would restore the legislatively crafted method for appointing electors in Florida to its status prior to November 7, would allow the completion of the proper selection of presidential electors in Florida according to the plan contemplated by the Constitution, and would aid in bringing legal finality to this election.

I. The 2000 Presidential Election

A. The Election Laws Of Florida As Of November 7, 2000

Prior to November 7, 2000, pursuant to the authority conferred on it by Article II of the Constitution and 3 U.S.C. § 5, the Florida legislature had enacted a comprehensive and carefully interwoven statutory plan and

set of procedures and timetables to govern the appointment of presidential electors, the conduct of elections, and the bringing and resolution of controversies and contests related thereto.

On the first Tuesday after the first Monday in November during a presidential election year, Florida holds an election in each of its sixty-seven counties for the purpose of selecting presidential electors. Following the election, each county's canvassing board is responsible for counting and certifying the returns and forwarding them to the Florida Department of State. *See* Fla. Stat. § 102.141. "[A]s soon as the official results are compiled from all counties," the statewide Elections Canvassing Commission—comprising the Governor, the Secretary of State, and the Director of the Division of Elections—is required to "certify the returns of the election and determine and declare who has been elected for each office." Fla. Stat. § 102.111(1).

Florida statutes specify a clear deadline by which counties must certify their returns to the Department of State. As the Florida Supreme Court itself put it in this case, "the deadline set forth in section 102.111(1), Florida Statutes (2000), requir[es] that all county returns be certified by 5 p.m. on the seventh day after an election." Pet. App. 4a. Section 102.111 underscores the firmness and importance of this deadline by providing that "[i]f the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties *shall* be ignored, and the results shown by the returns on file *shall* be certified." Fla. Stat. § 102.111(1) (emphasis added). Another provision of the election code, Fla. Stat. § 102.112, reiterates the requirement that county "[r]eturns *must* be filed by 5 p.m. on the 7th day following the . . . general election." Fla. Stat. § 102.112(1) (emphasis added). Using different terminology, § 102.112 states: "If the returns are not received by the department [of State] by the time specified, such returns *may* be ignored and the results on file

at that time may be certified by department." Fla. Stat. § 102.112(1) (emphasis added).

Prior to the seven-day certification deadline, Florida law provides for recount of the votes in close races when the margin of victory is less than one-half of one percent. *See* Fla. Stat. § 102.141(4). In addition to this provision, the legislature has provided that disputes over election results may be raised by submitting a "protest" to the county canvassing boards, *see* Fla. Stat. § 102.166(1)-(2), and/or a request for a manual recount, *see* Fla. Stat. § 102.166(4)-(10).[1] A protest must be lodged prior to the time the county canvassing board certifies the results or within five days after midnight of the date of the election, whichever occurs later. A request for a manual recount must be filed prior to the time the county canvassing board certifies the results or within 72 hours of midnight of the date of the election, whichever occurs later.

As of November 7, 2000, no provision of Florida law exempted the manual recount process from the seven-day certification deadline imposed by §§ 102.111 and 102.112. Thus, under the statutory scheme in effect on the date of the election, protest and recount procedures had to be completed before the seven-day deadline in order to be reflected in the county canvassing board's election returns, and the statutes expressly declared that county returns not received by the Secretary of State

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[1] County canvassing boards are authorized, but not required, to grant requests for a manual recount. *See* Fla. Stat. § 102.166(4)(a)-(c). If the canvassing board chooses to embark on a manual recount, the board "shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots," Fla. Stat. § 102.166(7)(a), and "[i]f the counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent," *id.* at (7)(b).

prior to the deadline (5:00 p.m. on November 14 in this case) "may be ignored." Fla. Stat. §§ 102.112.

After certification, candidates and voters may contest the certification of an election by filing a complaint in Leon County Circuit Court. *See* Fla. Stat. §§ 102.168, 102.1685. Such contests must be initiated within 10 days of the certification, *see* Fla. Stat. § 102.168(2). The contest process involves extensive judicial proceedings, including formal pleadings, discovery, trial, and appeals. *See* Fla. Stat. § 102.168(3)-(8); *Bolden v. Potter*, 452 So. 2d 564, 565-66 (Fla. 1984).

B. The Presidential Election In Florida And The Tabulation Of Votes

On November 8, 2000, the Florida Secretary of State announced that Governor Bush and Secretary Cheney had received the most popular votes in the previous day's election by a narrow margin. Those results were not certified, however, because the slim margin of victory triggered the recount provision of Florida law, and because of the need to receive and count overseas absentee ballots.[2]

On November 14, the results of the recount were announced: Governor Bush and Secretary Cheney had received the most popular votes for President and Vice President in the Florida election. The Florida Secretary of State announced her intention to proceed with certification of the results of the election upon receipt and tabulation of the overseas ballots.[3] On November 17,

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[2] Under a federal consent decree, Florida must allow ten days from the date of the election for overseas absentee ballots to be received. *See United States v. Florida*, Civ. No. TCA-80-1055 (N.D. Fla. Apr. 2, 1982).

[3] The Florida legislature has assigned the task of certifying the results of presidential elections to the Department of State. *See* Fla. Stat. § 103.011. County canvassing boards initially certify their local election results and forward them to the Department of State. The Elections Canvassing Commission, of which the Secretary of State is a member, is then charged with certifying the overall returns of the election and declaring who has been elected to office. *See* Fla. Stat. § 102.111.

2000, however, before the overseas ballots could be tabulated and the election results certified, the Florida Supreme Court *sua sponte* issued a stay order enjoining the Secretary of State and the Elections Canvassing Commission from proceeding with certification. Pet. App. 39a-40a.

In the interim, respondent Florida Democratic Party had filed protests in four counties: Broward, Miami-Dade, Palm Beach, and Volusia. Respondent requested that the ballots cast in those selected counties—each heavily Democratic—be recounted by hand under the manual recount provisions of the protest section of the Florida Election Code set forth in Fla. Stat. § 102.166(4)-(10).

The Florida statute governing manual recounts contains no standards describing how manual recounts will be conducted or guidelines concerning the means by which a voter's intent will be ascertained. The four counties thus embarked upon various paths in attempting to divine the "voter's intent." Fla. Stat. § 102.166(7)(b). Counties adopted conflicting guidelines for reviewing ballots, and changed their own guidelines and standards repeatedly throughout the recounting process. The confusion, bordering on chaos, that developed during these selectively focused manual recounts has been well-publicized. The manual recounts followed two mechanical counts of punch-card ballots in three of the counties and considerable hand examination of the physical ballots. Review of punch-card ballots proceeded from analysis of the degree to which punch-card

ballots had been perforated to examination for voter intent of indentations ("dimples") on the ballots.

II. The Litigation At Issue

After the Secretary of State announced her decision to certify the election results on November 14, 2000 without including the results of manual recounts submitted after the statutory deadline, Volusia County sued the Secretary and the Elections Canvassing Commission seeking to extend the November 14 limit on the time within which to submit county returns. Palm Beach County, the Florida Democratic Party, and Vice President Gore intervened as plaintiffs; Governor Bush and others intervened as defendants.

A. The Trial Court's Decisions

On November 14, 2000, the Circuit Court for Leon County held that the Secretary had discretion to ignore returns received after the statutory deadline. The court held that "the County Canvassing Boards must certify and file what election returns they have by the statutory deadline of 5:00 p.m. of November 14, 2000, with due notification to the Secretary of State of any pending manual recount, and may thereafter file supplemental or corrective returns," and also held that "[t]he Secretary of State may ignore such late filed returns . . . by the proper exercise of discretion after consideration of all appropriate facts and circumstances." Pet. App. 45a. The court reasoned that, under the language of Fla. Stat. § 102.112, "[t]hat the Secretary *may* ignor late filed returns necessarily means that the Secretary *does not have to* ignore such returns. It is, as the Secretary acknowledges, within her discretion." *Id.* at 48a.

After the trial court's order was announced, the Secretary of State asked counties interested in submitting returns after the deadline to provide her with written explanations of their reasons for doing so by 2:00 p.m. on Wednesday, November 15. J.A. 39. After receiving

submissions from four counties, the Secretary of State exercised her discretion and concluded that insufficient reasons had been given to justify extending the deadline to include the results of manual recounts not yet complete. J.A. 21-38.

Vice President Gore and others then asked the trial court to issue an order directing the Secretary to waive the statutory deadline and allow late results from three counties—Broward, Miami-Dade, and Palm Beach—to be included in the final vote tally. (The Volusia County manual recount was completed and the results submitted prior to the deadline.)

On November 17, 2000, the Circuit Court for Leon County issued its second decision, rejecting Vice President Gore's request to waive the statutory deadline. Pet. App. 42a-43a. The court held that the Secretary of State had not violated its November 14 order and explained that "the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision." Pet. App. 43a.

B. Proceedings In The Florida Supreme Court

Vice President Gore and Broward and Palm Beach counties appealed from the Leon County Circuit Court's decision that the Secretary of State had not abused her discretion in declining to include in the statewide tabulation results from manual recounts filed after the 5:00 p.m. November 14 deadline. On Friday, November 17, 2000, without the benefit of briefing or argument, the Florida Supreme Court *sua sponte* enjoined the Secretary of State and the Elections Canvassing Commission from certifying the November 7 presidential election results for the State of Florida until further order of the court. Pet. App. 39a-40a.

The following day, November 18, 2000, the results of the absentee balloting were announced. Governor Bush and Secretary Cheney were once again found to have received more votes than their opponents.

On the evening of November 21, 2000, the Florida Supreme Court issued its opinion reversing the orders of the trial court. Pet. App. 1a-38a.[4] The Florida Supreme Court held that the trial court had "erred in holding that the Secretary [of State] acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts." Pet. App. 34a. The court determined that the language of Fla. Stat. §§ 102.111 and 102.112, which provide that county canvassing boards "must . . . file[]" their returns by 5:00 p.m. on the seventh day following the election and that late-filed returns "may be ignored" or "shall be ignored" by the Elections Canvassing Commission did not control. The Florida Supreme Court concluded that the question before it was "whether the Commission *must accept* a return after the seven-day deadline set forth in sections 102.111 and 102.112," Pet. App. 14a (emphasis added), and answered this question in the affirmative.

The Florida Supreme Court rejected "hypertechnical reliance upon statutory provisions" in resolving the controversy. Pet. App. 8a; *id.* at 31a ("Technical statutory requirements must not be exalted over the substance of [the] right [of suffrage]."); *id.* at 36a ("the will of the electors supersedes any technical statutory requirements"). The court concluded that while it harbored "reluctance to rewrite the Florida Election Code, we conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here." *Id.* at 37a-38a. On this basis, the court then announced that the Secretary's discretion to ignore untimely election returns under Fla. Stat. §§ 102.111 and 102.112, could only be exercised "if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process." Pet. App. 35a.

[4] The supreme court consolidated the appeal with an original action in which the court was asked to resolve the conflict between two executive branch opinions concerning the Palm Beach County Canvassing Board's authority to conduct a manual recount. The court ultimately dismissed the original petition, but expressly stated in its opinion that the Palm Beach board had authority to conduct the county-wide manual recount. Pet. App. 2a n.1, 13a.

The Florida court thus announced that the November 14 deadline for accepting county election returns was inoperative in this election and directed the Secretary of State and the Elections Canvassing Commission to accept manual recount returns through 5:00 p.m. on Sunday, November 26, 2000. Pet. App. 37a-38a. Moreover, the court maintained its injunction preventing the Elections Canvassing Commission from certifying any election results until that date, and directed the Commission to include in its certified election results all manual recount returns received by that date. *Id.* at 38a.

III. Events Since The Petition Was Filed

As noted above, the Florida Supreme Court's decision announced a new deadline of 5:00 p.m. on November 26, 2000, for all counties to submit amended returns, including the results of any manual recounts. Thereafter, the Miami-Dade County Canvassing Board voted unanimously not to proceed with a manual recount. The manual recount was completed in Broward County. Palm Beach County did not complete its manual recount before Florida Supreme Court's November 26, 2000 5:00 p.m. deadline.

On the evening of November 26, 2000, as directed by the court below, all counties with outstanding results submitted election returns to the Secretary of State.

Governor Bush and Secretary Cheney once again were determined to have received the most votes. That same evening, the Elections Canvassing Commission certified the results and formally declared Governor Bush the winner of Florida's 25 Electoral College votes. Upon announcing the certified results, the Secretary of State explained why certification had been delayed:

> It was and it remains my opinion that the appropriate deadlines for filing certified returns in this election are those mandated by the Legislature. And it remains my opinion that the proper returns in this election are the returns that were certified by those deadlines. The Florida Supreme Court, however, disagrees. The court created a new schedule for filing certifications and conducting election contests rather than implementing the schedule enacted by the Legislature. . . .

Counting the Vote; Statements on the Certification of Florida's Votes, N.Y. TIMES, Nov. 27, 2000, at A13.

Vice President Gore has declared his intention to contest the election in circuit court by challenging the results certified by at least three Florida counties (Miami-Dade, Nassau, and Palm Beach). That contest was filed on November 27, 2000. In that litigation, the Vice President seeks a further round of manual recounting, this time conducted by judges, and seeks to have the results of those recounts included in the statewide returns.

SUMMARY OF ARGUMENT

1. The Florida Supreme Court's decision, which announced a new framework and timetable for resolving controversies over the presidential election results in that State, should be vacated because it does not comply with 3 U.S.C. § 5.

a. Responding to a presidential election crisis much like that unfolding in Florida during the past three

weeks, Congress enacted a statutory scheme to implement the constitutional mechanism of the Electoral College. 3 U.S.C. §§ 1-15. One of those statutes, § 5, provides that state-court resolutions of controversies regarding the appointment of presidential electors shall be conclusive only if they are made pursuant to "laws enacted prior to" election day.

b. The court below rejected Florida statutes and deadlines for the appointment of electors and the resolution of presidential election disputes as "hypertechnical." Instead, it resorted to its "equitable powers" to prescribe new standards and deadlines, suspend mandatory enforcement mechanisms, and curtail the discretion conferred on the state executive by the legislature. The decision below constitutes a clear departure from the legal requirements established before election day, and announces new rules governing the resolution of election disputes. The Florida Supreme Court thus consciously and boldly overrode Florida's "laws enacted prior to" election day and replaced them two weeks later with laws of its own invention.

c. Title 3 U.S.C. § 5 is designed to ensure that disputes relating to the appointment of presidential electors will be decided under laws made prior to the exigency under which they arose. It was enacted by Congress to discourage precisely what has happened in Florida this month, where the candidate who did not receive the most votes in the official tabulation is attempting to change the result by changing the rules. But the plain language of the statute provides that state courts must adhere to preexisting law if their resolution of election controversies is to be given binding effect. The court below failed to do so.

d. The Florida Supreme Court's decision should be vacated as a result of its failure to comply with 3 U.S.C. § 5. The resulting consequences are two-fold. First, the executive officials in Florida would be able to discharge all of their duties, including their duties imposed by fed-

eral law, under the rules in place on election day. Second, Congress would be able to give conclusive effect to the official certification of the Elections Canvassing Commission regarding the appointment of Florida's electors made pursuant to the carefully crafted scheme put in place before the election to apply equally to all voters and candidates. Vacating the decision below would thus allow the Electoral College process to reach a lawful, final, and conclusive resolution of the presidential election.

2. The Florida Supreme Court, by arrogating to itself the authority to make new rules applicable to this election contest, also violated Article II of the Constitution, which invests the authority to regulate the manner of appointing presidential electors in state legislatures.

a. The Constitution provides that "[e]ach State shall appoint [electors] in such Manner as the Legislature thereof may direct." U.S. CONST. art. II, § 1, cl. 1. History and precedent establish that this power granted to state legislatures is both plenary and exclusive.

b. Article II establishes a federally mandated separation of powers between the state legislature and other branches of state government in the context of choosing presidential electors. The Framers deliberately chose to invest the power to determine the manner of choosing electors in this particular branch of state government, thereby excluding the exercise of such power by the other branches. Any delegation of this constitutional authority must be both clear and express.

c. The Florida legislature has not granted to the state supreme court the authority to determine the manner of choosing electors. On the contrary, the legislature has established a complex and detailed framework for presidential elections, and has granted the executive branch the authority to exercise limited discretion and to certify the results of such elections in accordance with statutorily imposed deadlines. The state court reached

out and prohibited the executive branch officials from performing their duties, and announced new deadlines to supplant those enacted by the legislature. The court thus arrogated to itself the power to determine the manner in which Florida's electors are appointed, authority that the Constitution reposes only in the state legislature.

d. The proper remedy for the Florida Supreme Court's violation of Article II is nullification of its attempt to interfere in the manner in which the State's electors are appointed. The court below had no authority under the federal Constitution to announce new rules for this presidential election. Its attempt at judicial legislation was unconstitutional, and its actions patently *ultra vires*, and the court's decision is thus void. As a result, the state executive branch officials should be freed by this Court to carry out their duties without the unconstitutional interference of the state supreme court.

ARGUMENT

Presidential electors "exercise federal functions under," and discharge duties pursuant to, "authority conferred by" the Constitution. *Burroughs v. United States*, 290 U.S. 534, 545 (1934). The Constitution reposes in Congress authority to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. CONST. art. II, § 1, cl. 4. Congressional authority over electors is, however, much broader. The President exercises the whole of the Nation's executive power. U.S. CONST. art. II, § 1. "The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Burroughs*, 290 U.S. at 545. Among the powers vested in Congress is the power to "protect the election of the President and Vice President from corruption." *Id.* at 547. *A fortiori*, Congress also possesses ample authority to prevent chaos, turmoil, and violations of due process in presidential elections.

The Constitution allocates to each of the States the authority to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors," U.S. CONST. art. II, § 1, cl. 2, and the electors are, in turn, empowered to meet and to vote by ballot for the election of the President. U.S. CONST. amend. XII. Article II, § 1 does not, however, shield state election laws from other constitutional requirements. *See Williams v. Rhodes*, 393 U.S. 23, 29 (1968) ("Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions."). Indeed, state-imposed restraints on or impediments to the ability to cast an effective ballot in a presidential election "implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983).

Ballot requirements, "*including filing deadlines*, [have] an impact beyond . . . [the] borders" of a particular state. *Id.* at 795 (emphasis added). "Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries." *Id.* There is a "'pervasive national interest'" in presidential elections that is "'greater than any interest of an individual State.'" *Id.* (quoting *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)).

I. The Judgment Of The Florida Supreme Court Should Be Vacated Because It Does Not Comply With 3 U.S.C. § 5

A. State Court Determinations Regarding Controversies Over The Appointment Of Presidential Electors Lack Conclusive Effect Unless They Implement Legal Rules Enacted Before The Election

In keeping with the "broad congressional power to legislate in connection with the elections of the President and Vice President," *Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976), Congress has enacted statutes to implement the constitutional framework governing the Electoral College. *See, e.g.*, 3 U.S.C. §§ 1-15. Of particular relevance here, 3 U.S.C. § 5 sets forth the circumstances under which state court determinations relating to "any controversy or contest concerning the appointment of all or any of the electors" of the State will be given authoritative effect. Under § 5, such determinations shall be given "conclusive" effect and will "govern in the counting of the electoral votes," but *only* if the controversy is resolved exclusively by reference to "laws enacted *prior to*" election day. 3 U.S.C. § 5 (emphasis added); *see also id.* (providing that the determination of such "controvers[ies]" must be "made pursuant to" the prior enacted law). Thus, any judicial determination of a controversy regarding electors based on a new, post-election rule of state law would fail to satisfy the requirements of § 5 and would not receive the benefit Congress intended to confer on election results and the resolution of controversies concerning elections determined according to rules established and in place before an election.

Section 5 was enacted in 1887 as a reaction to the contested Hayes-Tilden election of 1876, a contest marked by naked partisanship, post-election maneuvering and accusations of corruption. In adopting the statutory scheme that emphasizes certainty and clear, pre-set

rules to govern disputes, Congress was evidently determined to avoid a similar episode. *See* 18 CONG. REC. 30 (Dec. 7, 1886) (remarks of Rep. Caldwell) (bill is intended to prevent repeat of "the year of disgrace, 1876" in which a "cabal . . . had determined . . . to debauch[] the Electoral College"). The manifest purpose of this federal law is to ensure that attempts by state courts or other tribunals to influence or affect the determination of the State's electors will not be effective when reached pursuant to rules, standards or criteria adopted after the voters have gone to the polls. As Representative William Craig Cooper of Ohio explained in the congressional debate on this statute (Act of Feb. 3, 1887, ch. 90, § 2, 24 Stat. 373), "these contests, these disputes between rival electors, between persons claiming to have been appointed electors, should be settled under a law made prior to the day when such contests are to be decided." 18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper); *see also id.* ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose").

Against this backdrop, any contention that the Florida Legislature satisfied 3 U.S.C. § 5 merely by delegating to the state courts the authority to resolve disputes concerning the appointment of electors is plainly untenable. First and foremost, nothing in Florida's election statutes authorizes the state supreme court to set aside carefully developed rules and thoughtfully balanced timetables for the conduct of election protests, recounts and contests. Even the supreme court expressed its "reluctance to rewrite the Florida Election Code." Pet. App. 37a. And given the detailed and carefully wrought statutory deadlines and the authority assigned to Florida's election officials, there is no basis for inferring that the legislature intended courts to exercise equitable powers to change the rules in the midst of the State's efforts to ascertain and pronounce election results.

Moreover, such an interpretation of the Judiciary's authority would render § 5 a virtual nullity, and would offer none of the protections that Congress sought to achieve in enacting the statute. If state legislatures could simply convey authority to a chosen tribunal to create new post-election rules to govern disputes over the appointment of electors, States could easily avoid the limitations imposed by 3 U.S.C. § 5. Section 5 plainly does not admit of such an interpretation, because it provides that the judicial or other determination at issue must have been made "pursuant to" preexisting law, not merely by a preexisting tribunal. As Representative Cooper cogently observed, "How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?" 18 CONG. REC. 47 (Dec. 8, 1886).

B. The Decision Below Announces New Rules Of Law And Timetables To Govern Controversies And Contests Concerning Florida's Appointment Of Presidential Electors

A judicial decision that has the effect of adopting a new rule of law to govern election disputes cannot, consistent with § 5, be applied retroactively to affect the appointment of presidential electors at an already-conducted election. Rather than confining its analysis and its remedy to the requirements set forth in Florida election statutes, the Florida Supreme Court invoked its inherent "equitable powers" to prescribe new deadlines, suspend mandatory fines, and eviscerate the Secretary's statutory discretion, all in favor of its own conception of what would constitute "a fair and expeditious resolution of the questions presented here." Pet. App. 37a-38a. Under 3 U.S.C. § 5, however, this Court has an independent obligation to ensure that Florida resolves any controversies over the appointment of electors by reference to the rules enacted by the legislature prior to the

election, not *post hoc* standards announced for the first time by courts some two weeks after the election.

In cases arising under the Ex Post Facto Clause, which similarly forbids certain types of retroactive state rulemaking, this Court has held that the question whether state law has changed in a manner that violates the Clause is a question of *federal*, not state, law, even though resolution of that question requires a comparative analysis of state law. *Lindsey v. Washington*, 301 U.S. 397, 400 (1937) ("[W]hether the [state-law] standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself."); *see Carmell v. Texas*, 120 S. Ct. 1620, 1639 n.31 (2000) ("Whether a state law is properly characterized as falling under the *Ex Post Facto* Clause, however, is a federal question we determine for ourselves."). By the same token, the question whether a State is attempting to resolve controversies over the appointment of electors by reference to "laws enacted prior to the day fixed for the appointment," or is instead attempting to impose new rules of law retroactively in violation of 3 U.S.C. § 5, is ultimately a question of federal law.

This Court has not previously had occasion to set forth the appropriate test for determining whether a state court has adopted a new rule of law within the meaning of § 5. The Court has, however, frequently addressed virtually the same question in determining whether to give retroactive effect to newly decided cases in the habeas corpus context. In *Teague v. Lane*, 489 U.S. 288 (1989), the Court explained that "[i]n general . . . a case announces a new rule when it breaks new ground . . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time . . . ." *Id.* at 301 (opinion of O'Connor, J.). In determining whether a rule of law announced by a court is in fact

new, this Court will "determine whether a . . . court . . . would have felt compelled by existing precedent to conclude that the rule" was required. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (internal quotation marks and citations omitted).[5]

While *Teague* uses prior judicial precedents as its point of reference for determining whether a judicial decision establishes a "new rule," the appropriate question under 3 U.S.C. § 5 is, of course, whether the Florida Supreme Court adopted a "new rule" as measured against the existing statutory provisions "enacted" by the legislature to govern presidential elections. Under this understanding, it is clear that the decision below announces a new rule for purposes of 3 U.S.C. § 5. Plainly, the decision below "breaks new ground" and announces a result that was not "dictated by" statutes in effect at the time of the November 7 election. As even the Gore respondents acknowledge, the state supreme court failed to resolve the dispute at issue here according to laws "enacted prior to" election day. Instead, "[i]n light of the unique circumstances of the case, the court *invoked its equitable powers to fashion a remedy* . . . ." Gore Opp. 12 (emphasis added); *see* Pet. App. 37a. The invocation of a court's equitable powers to fashion novel remedies, new rules, and *ad hoc* timetables plainly fails

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[5] The *Teague* line of cases provides a useful metric for determining whether a court has announced a new rule, and *Teague*'s underlying concerns for finality and the enforcement of settled expectations parallel the interests served by 3 U.S.C. § 5. Under *any* permissible definition, however, the Florida Supreme Court's decision in this case imposed new rules. There is simply *no* law enacted prior to Election Day that set forth the deadline of November 26 announced in the decision below or the virtually non-existent range of discretion within which the Secretary of State was allowed to operate. A legislative pronouncement that required (or authorized) late returns to be ignored was inverted into a requirement that late returns be accepted.

to comply with the congressional directive that disputes concerning the appointment of presidential electors must be resolved "pursuant to" the "laws enacted prior to" election day in order to be given effect. 3 U.S.C. § 5.

Undeterred by—and seemingly indifferent to—the express federal statutory disapproval of the *post hoc* creation of new legal rules that could change the outcome of controversies over the appointment of presidential electors, the Supreme Court of Florida has authorized a 180-degree departure from the established legal requirements set forth by the Florida Legislature that were in place on November 7. Prior to election day 2000, the Florida Legislature had enacted clear legislative directives regarding the certification of votes cast in the presidential election. Section 102.112 of the Florida Statutes unequivocally required that election returns by county canvassing boards "must be filed by 5:00 p.m. on the 7th day following the . . . general election . . . ." The new rule of law announced by the decision below changes the effective deadline for submission of election returns from November 14 until November 26 (Pet. App. 38a), nearly tripling the statutory seven-day protest period and certification deadline mandated by the Florida Legislature.

Further, § 102.111 of the Florida Statutes provides that the Elections Canvassing Commission "shall . . . ignore[]" county returns filed after 5:00 p.m. on the seventh day following the election, and "shall . . . certif[y]" the election based on the results returned before the deadline. Section 102.112(1) confirms that late-filed returns "may be ignored" by the Elections Canvassing Commission. *See* Fla. Stat. § 102.112.[6] In the face of

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[6] This statute, enacted in 1989, appears to have been passed in response to the Supreme Court of Florida's decision in *Chappell v. Martinez*, 536 So. 2d 1007, 1008-09 (Fla. 1988), in which the court affirmed the Secretary of State's exercise of discretion to accept late returns from a county that had substantially complied with the statutory deadline. In passing § 102.112, however, the state legislature did not amend or in any way alter § 102.111. In fact, the Florida House *rejected* an amendment that would have replaced "shall" in § 102.111 with "may." 1989 Fla. Sen. J. 819. In any event, as discussed below, § 102.112 states that late results *may* be ignored, not that such results *may not* be ignored, as the Florida Supreme Court's novel ruling directed.

this clear and preexisting legislative directive, the Supreme Court of Florida has concluded retroactively that the Elections Canvassing Commission shall *not* and may *not* ignore late-filed returns, but *must* hold the results of a national election open for an additional extended period of time, and *shall* include late returns based on selective manual recounts in individual counties. Pet. App. 38a.

Even if the Secretary of State *might* have been authorized to excuse a county board's insubstantial noncompliance with the 5:00 p.m. November 14 deadline (*see* Fla. Stat. § 102.112), nothing in Florida law as it existed before November 7, 2000, *required* that she do so, and certainly there was no preexisting requirement in Florida law that she accept returns filed 12 days after the statutory deadline, thus tripling the legislature's protest period and concomitantly shortening the contest period. Indeed, without any support in Florida election statutes, the court below simply announced that "[t]he Secretary may ignore [late] returns only if their inclusion will compromise the integrity of the electoral process in either of two ways: (1) by precluding a candidate, elector, or taxpayer from contesting the certification of election pursuant to section 102.168; or (2) by precluding Florida voters from participating fully in the federal electoral process." Pet. App. 37a. These explicit but sharply limited, judicially crafted criteria wholly supplant the explicit provisions of §§ 102.111 and 102.112, which (at most) leave the power to excuse compliance with the certification deadlines to the Secretary's discretion.

The Florida Legislature directly contemplated close elections when it enacted the controlling statutory provisions at issue. Florida election law not only authorizes machine and manual recounts, but sets explicit limits and short timeframes for the period during which they may be conducted. In passing §§ 102.111 and 102.112 the legislature plainly determined that expedition and finality were paramount considerations, and elevated those goals over the need for manual recounts that might threaten to drag on interminably. If requested, manual recounts are neither required nor are they conducted on a statewide basis. The statutory deadline, by contrast, is expressed in unambiguously mandatory terms and applies uniformly throughout the state. No meaningful conflict can be discerned between the carefully confined time limits for the protest phase, including the manual recount provisions, and the statutory deadline provisions: manual recounts, under the law as it existed on November 7, must be completed within the deadline.

The new, judicially established statutory deadline written in place of the one contained in §§ 102.111 and 102.112 also creates a new rule of law in that it effectively modifies the legislative provisions providing for contests to election results. *See* Fla. Stat. § 102.168. That statute clearly anticipates that results will be certified in a timely fashion, in order for the results to be contested in court. A contestant has ten days from the time the last county canvassing board certifies its returns to file his or her complaint. The defendant then has ten days to file an answer. By issuing a judicial decree that pushes back the deadline for certification from November 14 to November 26, the Florida Supreme Court has modified the preexisting rule of law discernible on the face of the legislature's contest provisions. Indeed, because any judicial or other proceedings regarding challenges to the appointment of electors must be finally re-

solved by December 12,[7] contestants, and particularly defendants, will not have the statutorily provided time in which to file their pleadings, conduct discovery, and participate in a trial and appeal as contemplated by the legislature. Plainly, the Florida Supreme Court created a new rule, one that had not been in existence before election day 2000, for resolving disputes concerning the appointment of electors.[8]

Because no preexisting rule of law required the Secretary of State to waive the time limit on the facts presented, the Florida Supreme Court's attempt to enforce its newly announced rule retroactively plainly fails to satisfy 3 U.S.C. § 5. That is particularly true in this case, given the court's acknowledgement that it was not interpreting Florida law, but was relying on principles of "equit[y]" to justify its decision. *E.g.*, Pet. App. 37a. Significantly, the requirements of 3 U.S.C. § 5 are satisfied only if the state court determination at issue is made pursuant to laws that were "*enacted*" prior to election day. In imposing this requirement, Congress faithfully adhered to the constitutional mandate that state *legislatures* are to direct the manner in which presidential electors are appointed. U.S. CONST. art. II, § 1, cl. 2.

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[7] Section 5 of Title 3 provides that any controversy or contest concerning the appointment of presidential electors shall be resolved "at least six days prior to" the day fixed for the meeting of electors. 3 U.S.C. § 5. The day fixed for the meeting of presidential electors this year is December 18, 2000. *See* 3 U.S.C. § 7.

[8] Similarly, the constantly changing and county-to-county variations in the recount protocols and standards, including consideration by some counties during the manual recount of simple indentations known as "dimples" as legally cast votes, clearly marks a departure from prior practice as of November 7, and thus reflects another post-election change in procedures that is inconsistent with § 5.

By choosing the term "enacted," Congress made clear that the laws to be followed in resolving disputes are state *legislative* acts, not the post-election equitable decrees fashioned by state courts to promulgate new rules. This understanding comports with accepted legal usage of the term "enacted" and with decisions from this Court. *See* BLACK'S LAW DICTIONARY 890, 1606 (7th ed. 1999) (s.v. "law") (defining "enacted law" as "[l]aw that has its source in legislation; WRITTEN LAW"; defining "written law" as "[s]tatutory law, together with constitutions and treaties, *as opposed to judge-made law*") (emphasis added); *United States v. Brown*, 381 U.S. 437, 443 (1965) (distinguishing "legislative enactment" from "judicial application" and "executive implementation"); *United States v. Harris*, 106 U.S. 629, 639 (1883) (referring to "the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments"). The decision below, by rejecting the "technical" requirements actually "enacted" by the Florida Legislature in favor of the court's own notions of "equity," clearly fails to satisfy § 5's requirement that election law disputes be resolved pursuant to preexisting "enact[ments]."

Thus, the decision below was not dictated by preexisting law and, in fact, the statutory provisions applicable to resolving disputes over the appointment of electors were expressly overridden. Although the state supreme court's decision *discusses* Florida laws that existed prior to election day, it does not identify any source of preexisting law that set forth the substance of the rules set forth in the judgment below. The Florida Supreme Court itself fully acknowledged throughout its opinion that it was not following the legislature's express directives. Indeed, it dismissed such provisions as inconvenient "[t]echnical statutory requirements." Pet. App. 31a. The Florida Supreme Court's decision thus consciously and unapologetically fails to adhere to the "laws enacted prior to" election day. Nothing in Florida law prior to November 7 revealed that the seven-day pe-

riod for certification of election results was in reality a nineteen-day period, or that the Secretary of State's broad power to enforce the statutory deadline and reject untimely election returns was wholly displaced by extra-statutory criteria. Far from being compelled by preexisting legislative enactments, the state supreme court's decision clearly changed Florida election law and announced a "new rule."

Tellingly, even the Gore respondents do not dispute that a change in the law took place. They simply claim that the Florida Supreme Court's decision does not "'change the rules' *in any way that implicates federal law*." Gore Opp. 17 (emphasis added). Under 3 U.S.C. § 5, however, *any* post-election change in the rules governing the appointment of presidential electors (much less the extensive revisions introduced by the Florida Supreme Court in this case) not only implicates federal law, it squarely ignores and overrides the federal requirements and standards enunciated in § 5.

C. The Florida Supreme Court's Decision Also Upsets The Policy Choice Made By Congress In 3 U.S.C. § 5

As noted above, the legislative history and purpose of 3 U.S.C. § 5 confirm that the new rule announced by the Florida Supreme Court is inconsistent with the requirements of § 5. The intent of § 5 is to ensure that disputes relating to the appointment of presidential electors will be "decided under and by virtue of laws made prior to the exigency under which they arose." 18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper). In other words, the rule of law means the application of rules properly enacted and generally understood *before* the contest—not rules made up afterwards to suit the needs of one or the other of the protagonists.

The federal rule enunciated by Congress in 3 U.S.C. § 5 serves obvious and important public policy interests by discouraging precisely what is happening in Florida

today, where the candidate who did not receive the most votes and his subordinates seek to overturn the results of the presidential election by appealing for the enactment of new rules after the election has been held. That was done repeatedly during the recounts, ending with the effort to force adoption of the "dimpled" ballot concept, and it was done when the time limit for conducting manual recounts was changed from seven to nineteen days. Section 5's rejection of such retroactive rulemaking in the election context provides a statutory corollary to the principle of federal constitutional law recognized by the Eleventh Circuit in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). As the court of appeals held in that case, constitutional principles of due process and fundamental fairness preclude the States from adopting "a post-election departure from previous practice" and applying that post-election rule retroactively to determine the outcome of an election. *Id.* at 581. Here, as in *Roe*, "had the candidates . . . known" that the state supreme court would retroactively extend the deadline for submission of election returns notwithstanding the plain language of the governing statutes, or that recount standards would be changed from day to day according to the whims of the officials in charge of the process in each county, "campaign strategies would have taken this into account . . . ." *Id.* at 582. Indeed, the candidates' decisions whether to seek a manual recount in specific additional counties might well have been affected had petitioner and other candidates known that the Florida Supreme Court would subsequently extend the statutory deadline nearly threefold and that local officials could adopt recount rules that favored their preferred candidates. Considerations of due process and fundamental fairness plainly preclude such retroactive rulemaking here.

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The application of 3 U.S.C. § 5 in these circumstances is straightforward. Perhaps because no candi-

date has previously resisted so strenuously and resourcefully the certification of election results as has Vice President Gore, this Court has not previously been called upon to decide whether or not the state courts, in order to satisfy § 5, must adhere to preexisting law in resolving election disputes. But the plain language of the federal statute indicates that they *must* do so if their decisions are to be given binding effect, and it is equally plain that the Florida Supreme Court failed to do so here.

D. Because The Judgment Below Does Not Comply With 3 U.S.C. § 5, It Is Not Binding On Congress Or The Elections Canvassing Commission

The additional question posed by this Court asks "What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?"

The appropriate remedy to follow from such a finding seems obvious: This Court should vacate the Florida Supreme Court's judgment, thereby reinstating the Elections Canvassing Commission's statutory authority to act in accordance with the clear and specific deadlines prescribed by Florida election law as of November 7, 2000. The same relief would flow, of course, from this Court's determination that the decision below violates Article II.

Such a result would permit Florida's executive officials to perform their duties under the law as it existed on November 7, 2000. As explained above, Title 3 sets forth a carefully crafted *federal* scheme, in which the States play a crucial role. Florida, in particular, has through its legislature designated certain state executive branch officials, including the Secretary of State and the Elections Canvassing Commission, as the state officials responsible for performing Florida's obligations under the federal scheme and exercising appropriate discretion.

Title 3 U.S.C. § 15, which directly implements Congress's authority under the Twelfth Amendment to count electoral votes, sets forth, *inter alia*, the procedures by which Members of Congress may object to the votes cast by certain electors, and how Congress will resolve those objections. It provides that "no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected . . . ." 3 U.S.C. § 15. Section 6, in turn, states that "if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the Seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made." 3 U.S.C. § 6. Thus, this Court's determination that the judgment below does not comply with § 5 would also ensure that Congress, in performing its functions under 3 U.S.C. § 15, would be bound to give "conclusive" effect to the official certification of the Elections Canvassing Commission concerning the appointment of Florida's electors made according to the unmodified Florida election law. 3 U.S.C. § 5.

Congress has enacted a statutory framework that is dependent to a significant degree on certifications and other actions by state executive officials, which Congress has deemed necessary to fulfill its constitutional responsibilities related to counting the votes of the electoral college. It would frustrate Congress's carefully orchestrated procedures for carrying out these important constitutional duties if state courts, acting in a manner manifestly inconsistent with 3 U.S.C. § 5, could nonetheless issue injunctions and other binding orders to state executive officials that prevent them from performing their duties in accordance with pre-existing Florida statutes and, thus, with 3 U.S.C. § 5.[9]

This conflict is heightened by the fact that in certain circumstances, where the provisions of 3 U.S.C. § 5 have not been complied with, federal law gives conclusive effect to the determinations of the responsible state executive officials. Under 3 U.S.C. § 15, for example, if Congress receives multiple electoral vote returns from a State, none of which complies with 3 U.S.C. § 5, and the two Houses of Congress are unable to agree on which return to count, "then, and in that case, the votes of the electors whose appointments shall have been certified by the executive of the State, under the seal thereof, shall be counted." 3 U.S.C. § 15. Plainly, because a clear goal of § 5 is to *avoid* any possibility that Congress would be bound by state determinations that do not comply with § 5, it cannot be the case that a state court determination that is inconsistent with § 5 can compel state executive officials to certify election results in such a way as to bind Congress.

The Florida Supreme Court's decision thus stands as an obstacle to state executive officials' performance of their federal statutory duties. A finding by this Court that the Florida decision was inconsistent with the requirements of 3 U.S.C. § 5 would accordingly require a declaration that the judgment below—as a matter of *federal* law—is a nullity, to the extent it purports to bind state executive officials with federally assigned responsibilities relating to the November 7 election and the

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[9] Petitioner emphasizes that he is *not* asking this Court to declare the "correct" rule of Florida law. Rather, petitioner is simply seeking to ensure that Florida officials are able to perform their *federal* duties with respect to this election without being restrained by the newly fashioned equitable decree, standards and timetable announced by the Florida Supreme Court to supplant the rules for this election.

choice of presidential electors.[10] As a result, the Elections Canvassing Commission would be free to recertify petitioner, once again, as the winner of the election context in Florida, with a corrected vote total reflecting the vote tabulated in compliance with the statutory deadline of November 14.[11]

While it is true that petitioner was also certified the winner under the judicially-created deadline of November 26, the votes certified under that judicially-imposed procedure are substantially different from those that would have been certified as of the statutory deadline of November 14. Those differences may have significant consequences for the election contest challenge currently being mounted by Vice President Gore.

Under Florida law, there is a "presumption that returns certified by election officials are presumed to be correct." *Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1975). Specifically, certified election returns are "regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld." *Id.* at 268-69 n.5 (quotation omitted). Consequently, to overcome this strong presumption, an election challenger must show, as a threshold matter, that there has been "substantial noncompliance with the election statutes." *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998).

[10] There is nothing surprising about that principle of law. For example, in the context of the Extradition Clause, U.S. CONST. art. IV, § 2, cl. 2, and the federal statute that implements it, 18 U.S.C. § 3182, this Court has overturned state court decisions that interfere with state executive officials' attempts to perform their duties imposed by federal law. *New Mexico ex rel. Ortiz v. Read*, 524 U.S. 151, 154-55 (1998); *California v. Superior Court*, 482 U.S. 400 (1987).

[11] Nothing in the foregoing analysis, of course, affects the validity of the Elections Canvassing Commission's November 26 certification that petitioner received the most votes in Florida's presidential election. The same presidential electors would have been elected under a standard that complied with the statutory deadline, because petitioner and Secretary Cheney received the most votes each time the votes were tabulated.

The proper application of this strong presumption to the results that would have been certified by the Elections Canvassing Commission but for the Florida Supreme Court's *sua sponte* November 17 order and November 21 opinion and order would be significant to petitioner. First, the vote margin for petitioner is significantly smaller under the November 26 certification than it would have been under the certification required by the statute. Perhaps more importantly, the *content* of the votes certified on November 26—and thus entitled to the presumption of correctness—is significantly different than it would have been under the statutory deadline. For example, the November 26 certification includes "dimpled" ballots manually recounted in Broward County, a process that produced 567 additional votes for the Vice President. If this Court finds that the Florida Supreme Court's amendment of the statutory deadline to November 26 is inconsistent with § 5, those 567 votes will not be clothed with the presumption of correctness afforded certified election returns. Instead, the vote tally produced by the normal, machine assisted, recount and submitted by Broward County on November 14 will be entitled to that presumption. Which votes are viewed as the properly certified election results could have significant consequences for the election contest.[12]

[12] Moreover, if this Court rules that election standards—including the standards for assessing valid ballots—promulgated after November 7 are not "conclusive" under § 5, the Florida courts in the election challenge will not accept Vice President Gore's newly developed "dimpled" ballot standard as a permissible basis for determining proper certification of presidential electors.

Vice President Gore also claims in his election contest that the Elections Canvassing Commission should have included the tabulation of ballot changes manually recounted in Palm Beach County by 5:00 p.m. on November 26 (or, alternatively, should have extended the deadline still further). Similarly, the Vice President argues that Miami-Dade County Canvassing Board abused its discretion by not conducting a partial recount of votes for the November 26 deadline. Both these claims will be rendered invalid if the state election officials are free to enforce, as the proper deadline under federal law, the statutory deadline previously established by the Florida legislature.

Perhaps the most significant consequence of the Court's ruling for petitioner would be to clarify the governing federal law standards and thereby forestall an impending constitutional crisis. As it currently stands, an election contest is proceeding, and the matter is before the Florida courts. If this Court holds, under 3 U.S.C. § 5, that an exercise of "equitable powers" to alter existing statutory standards is an impermissible change in the law, and that judicial amendment of statutory standards enacted by the legislature is contrary to Article II, § 1's grant of plenary authority to state legislatures, the prospect of subsequent judicial amendment—and of dualing slates of electors mandated by dualing branches of Florida's government—is substantially diminished.

Nor does the fact that Congress and the Florida Legislature have other means of remedying state judicial violations of U.S. Const. art. II, § 1, cl. 2, and 3 U.S.C. § 5 preclude this Court from prescribing the proper remedy.[13] To be sure, what the Florida Supreme Court did

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[13] Under 3 U.S.C. § 2, the Florida Legislature has the authority to direct the "manner" of appointing electors when the State "has failed to make a choice on the day prescribed by law." When there is a controversy over the appointment of electors and the State fails to make a "final determination" of

in this case was to usurp the prerogatives of the Florida legislature, and the legislature is constitutionally and statutorily empowered to respond by appointing electors or otherwise legislating with regard to the manner of appointment. U.S. CONST. art. II, § 1, cl. 2; 3 U.S.C. § 2. By acting now to reject the Florida Supreme Court's unwarranted intrusion into the regulation of the manner of appointing electors, this Court will eliminate the potential for a constitutional crisis arising out of an unseemly conflict among Florida's legislative and judicial branches regarding the appointment of electors.

In *McPherson v. Blacker*, 146 U.S. 1 (1892), moreover, the Court entertained a challenge to a Michigan statute authorizing the appointment of electors through district, rather than statewide, elections. Michigan's Secretary of State argued that given the role of Congress, as well as certain state executive officers, in determining election results, disputes regarding the appointment of electors were not subject to judicial review and remedies. *Id.* at 23. The Court squarely rejected that argument, concluding that the validity of Michi-

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its electors pursuant to 3 U.S.C. § 5, the legislature plainly possesses the authority to resolve that dilemma under § 2. Thus, § 2 and § 5 are complementary parts of Title 3's framework for regulating the appointment of electors. Section 5 gives the State an opportunity to resolve any "controversy" or "contest" over electors if it does so in accordance with statutes enacted prior to the election, provided that a final determination pursuant to such statutes is reached "at least six days before the time fixed for the meeting of the electors." 3 U.S.C. § 5. In contrast, § 2 contemplates that, if necessary, the legislature will prescribe the "manner" of appointing electors following the election. Accordingly, § 2 recognizes the state legislature's power to protect its constitutional prerogatives over the appointment of electors in the event that, *inter alia*, its pre-election statutory scheme is subverted or otherwise fails to produce a conclusive choice under § 5.

gan's method of appointment raised "a judicial question," subject to judicial orders. *Id.* at 24.

Similarly, in *Foster v. Love*, 522 U.S. 67 (1997), the Court enforced a private right of action against Louisiana's primary election system under 2 U.S.C. § 7, which prescribes a uniform day for the election of Senators and Representatives. Although the question apparently was not raised in that case, it is important to note that Article I, Section 5 provides that "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members." U.S. CONST. art. I, § 5, cl. 1. Thus, if Louisiana's election scheme violated federal requirements for the election of Senators and Representatives, each House presumably could have enforced that requirement in the context of judging "the Elections" of its members. That fact, however, did not prevent this Court from fashioning an appropriate judicial remedy.

Congress enacted 3 U.S.C. § 5 to protect the strong national interest in having disputes over electors resolved through pre-established rules, thereby ensuring finality and fairness to the resolution of such inherently political contests and to avoid the kind of contentious, chaotic and standardless process that has characterized the Florida situation during the three weeks since November 7. That Congress retains the right to count the returns of the electoral college to resolve such disputes where necessary does not protect the same important federal rights and interests that Congress sought to protect through § 5. *Cf. Clinton v. City of New York*, 524 U.S. 417, 430 (1998).

II. The Florida Supreme Court's Decision Violates Article II Of The Constitution Of The United States

In addition to being irreconcilable with the requirements of 3 U.S.C. § 5, the Florida Supreme Court's decision violates Article II of the Constitution, which expressly invests state *legislatures* with the power to determine the manner in which presidential electors are appointed. As this Court has recognized, the Constitution "leaves it to the legislature *exclusively* to define the method of effecting the object" of appointing electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (emphasis added). In the absence of clear and express delegation of that power by the state legislature to a coordinate branch of state government, the Constitution forbids the exercise of such power by any branch other than the legislature. In Florida, the legislature manifestly did *not* grant the authority to adjust deadlines for election returns to organs of the Florida judiciary. Rather, it set forth a precise statutory scheme to govern the appointment of presidential electors. The Florida Supreme Court's extensive and unauthorized revision of that scheme was unconstitutional.

A. The Framers Vested The Authority To Determine The Manner For The Appointment Of Presidential Electors In The State Legislatures

In constructing the new national government, the Framers were confronted with the problem of how its officials would be chosen. They settled on three separate schemes. The Members of the House of Representatives would be elected "by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. The Senators would be "chosen by the Legislature" of each State. U.S. CONST. art. I, § 3, cl. 1.[14] As for the President and Vice President, the Framers devised a new system of indirect election that has become known as the Electoral College. *See* U.S. CONST. art. II, § 1 & amend. XII.

The Electoral College was the product of considerable debate and compromise at the Convention. The

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[14] This mode of selection was later changed to provide for direct popular election of Senators. U.S. CONST. amend. XVII.

Framers ultimately settled on a system of electors, who would be appointed from each State and who, in turn, would vote for the President and Vice President. *See* THE FEDERALIST No. 68 (Hamilton) (Clinton Rossiter ed. 1961). This approach was adopted to minimize "the danger of intrigue & faction." 2 *The Records of the Federal Convention of 1787* 500 (Max Farrand ed., 1966) ("Farrand") (floor remarks of Gouverneur Morris).

The most significant issue to be resolved was how the electors themselves would be chosen. Some of the delegates argued for popular election, while others sought to vest the authority to appoint electors in either the executive or the legislative branches of the several States. In light of the length and passion of the debates over the mode of selecting the President, it is notable that *not a single delegate* to the Convention suggested that the power to determine the manner of appointing electors be vested in the state courts. As James Madison said on the floor, "[t]he State Judiciarys had not & he presumed wd. not be proposed as a proper source of appointment." 2 Farrand 110.

In the end, the Convention resolved to instill the state *legislatures* with the power to determine the manner of appointing electors. As ratified, the Constitution provided that "[e]ach State shall appoint [electors] *in such Manner as the Legislature thereof may direct*." U.S. CONST. art. II, § 1, cl. 2 (emphasis added). As this Court has recognized, "[t]he final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." *McPherson*, 146 U.S. at 28; *see also Ray v. Blair*, 343 U.S. 214, 224 n.11 (1952) ("Discussion in the Constitutional Convention as to the manner of election of the President resulted in the arrangement by which

presidential electors were chosen by the state as its legislature might direct").[15]

In the early days of the Republic, several state legislatures chose electors directly, without conducting a vote of the citizenry. The constitutionality of this practice was quickly settled:

> When a bill to regulate presidential elections was before the First Congress, Representative Giles argued that by prescribing that electors should be chosen "in such Manner as the Legislature . . . may direct" the Constitution implied that the legislatures were not permitted to make the choice themselves; electors were to be chosen by the people. Giles was immediately corrected from both ends of the political spectrum. The power was "left discretionary with the state Legislatures," said Jackson of Georgia—as Goodhue of Massachusetts added, "by the express words of the Constitution."

Currie, *The Constitution in Congress* 138 n.60 (1997) (citations omitted). "The states took advantage of the latitude thus afforded them to employ a wide variety of methods for choosing electors." *Ibid.*; *see generally McPherson*, 146 U.S. at 28-35 (cataloguing various methods by which States have chosen electors).[16]

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[15] Alexander Hamilton explained that the Electoral College was designed "to afford as little opportunity as possible to tumult and disorder." THE FEDERALIST No. 68, at 411 (Alexander Hamilton) (Clinton Rossiter ed. 1961). The goal was to ensure that the President be elected in the absence of "heats and ferments," "sinister bias," or "corruption." *Id.* at 412.

[16] The wide variety of procedures that have been employed by state legislatures over time demonstrates that the Article II structure is fully consistent with principles of federalism. At the same time, however, "the provisions governing elections

B. In The Absence Of Express Legislative Direction, The State Executive And Judicial Branches Are Constitutionally Prohibited From Engrafting Material Changes Onto The Manner Of Appointing Presidential Electors

The words "in such Manner as the Legislature ... may direct" in Article II establish a federally mandated separation of powers between the state legislature and other branches of state government in the context of choosing presidential electors. "[T]he insertion of those words," this Court has explained, "operate[d] as a limitation upon the State in respect of any attempt to circumscribe the legislative power." *McPherson*, 146 U.S. at 25. The Florida legislature has thus been granted, by the Constitution itself, plenary authority to regulate the manner of appointment of presidential electors: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States." *Id.* at 34-35 (quoting Senate Rep. 1st Sess. 43 Cong. No. 395 (Sen. Morton)); *see also State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 285 (Neb. 1948) ("Article II, section 1, of the Constitution of the United States ... leaves to the Legislature of the state the manner of determining how 'Each State' shall appoint its presidential electors. It is a matter within the control of the state Legislature."); *McClendon v. Slater*, 554 P.2d 774, 777 (Okla. 1976) ("the Legislature has the duty to direct the manner of choosing presidential electors").

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reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). The States have been given a role in this most national of elections, but that role is not (as respondents have suggested) exclusive of any federal interest. To the contrary, as shown above, the federal interests in presidential elections are paramount and pervasive.

The reason that the Framers committed the manner of appointing electors to the legislatures of the several States was that the legislative branch of government, unlike the executive or the judicial, is representative of the will of the people. This Court has explained that legislature "was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." *Hawke v. Smith*, 253 U.S. 221, 227 (1920); *see also McPherson*, 146 U.S. at 27 (Article II "recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object"). The Framers expected that choices regarding the manner of appointing presidential electors would be made by such a representative body.

It is significant that the Framers specifically identified the state *legislatures* as the repositories of the power to determine the manner of appointing presidential electors. Several provisions of the Constitution assign federal authority or responsibility to the several States. Such authority is sometimes vested in the States *qua* States.[17] A number of other constitutional provisions identify with precision the state institution that is charged with exercising particular duties integral to the functioning of the federal government. For example, various constitutional provisions specify that the state

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[17] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 16 ("reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"); *id.* art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws ....").

executive is to perform duties.[18] Many single out state legislatures as the appropriate agents for exercising federal power, often subject to explicit qualifications or reservations of power in Congress.[19] At least one provision, the Supremacy Clause, singles out state judges for the assignment of federal responsibilities.[20] The Constitution's reliance on particular state institutions under such provisions is so carefully crafted that at least one provision, the Guarantee Clause, specifies that the United States can intervene to protect States "against domestic Violence" "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)." U.S. CONST. art. IV, § 4.

In light of the Constitution's precise distinctions among state legislative, executive, and judicial powers, the Founders' decision to vest specific authority in state legislatures must be understood to be exclusive of state

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18 *See, e.g.*, U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); *id.* art. IV, § 2, cl. 2 (requiring States to extradite persons charged with treason "on Demand of the executive Authority of the State from which he fled").

19 *See, e.g.*, U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations . . . ."); *id.* art. V (amendment may be proposed "on the Application of the Legislatures of two thirds of the several States"); *id.* (constitutional amendments become effective when ratified "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by Congress").

20 *See* U.S. CONST. art. VI, cl. 2 ("[T]he Judges in every State shall be bound [by the Constitution, laws and treaties of the United States], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

executive or judicial power to prescribe the "Manner" of appointing electors. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983); *McPherson*, 146 U.S. at 27. Thus, while the Constitution does not generally require States to observe the separation of powers principles that inhere in our federal constitutional structure, States *must* provide for the manner of appointment of electors through the legislative process rather than by resort to the executive or judicial branches of their respective governments. *Cf. Thornton*, 514 U.S. at 804 ("the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States").

The Florida legislature *could* have delegated to state courts some authority over the manner appointing electors. *See McPherson*, 146 U.S. at 34-35 ("it is, no doubt, competent for the legislature to authorize the governor, *or the Supreme Court of the State*, or any other agent of its will, to appoint these electors") (emphasis added). But any such delegation must be both clear and explicit. Because the power to determine the manner of appointing electors is vested by the Constitution itself in the state legislature—and only in the state legislature—it cannot be presumed to have been delegated *sub silentio*, nor can another branch arrogate it to itself without the legislature's express approval.

C. The Florida Supreme Court Has Not Been Granted Authority To Determine The Manner Of Appointing Presidential Electors

In Florida, the legislature has directed that the State's presidential electors be appointed in accordance with the results of a popular election. *See* Fla. Stat. § 103.011. The Florida legislature has expressly assigned the task of certifying the results of that election to the Department of State, *see id.*, and the duty to make and sign the certificates of election for presidential electors

to the Elections Canvassing Commission. *See* Fla. Stat. § 102.121. Moreover, Florida law makes clear that counties must certify election results by 5:00 p.m. on November 14. *See* Fla. Stat. §§ 102.111(1), 102.112(1). The members of the Elections Canvassing Commission—the executive branch entity the legislature has charged with the obligation (or discretion) to certify the results "as soon as the official results are compiled from all counties," § 102.111—have repeatedly expressed their intention to comply with the statutory deadline of November 14 and to appoint electors based on the election returns submitted by that date. That decision would be consistent with the "manner" the Florida legislature has directed for the appointment of electors.

The state supreme court, however, enjoined the Elections Canvassing Commission from certifying the results under the statutory schedule, and has invented an entirely new deadline that has no basis in any statute or other legislative enactment. Because the Constitution specifically assigns to state legislatures the power to direct the manner of appointing presidential electors, however, the court was constrained to follow the statutory scheme established by the Florida legislature. It manifestly failed to do so.[21]

The Florida Supreme Court made clear that it felt no obligation to adhere to the statutes applicable to the elec-

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[21] These issues involve, to a certain extent, the examination of Florida state statutes. Because this inquiry is inextricably bound with the federal question of whether the Florida Supreme Court's order was unconstitutional under Article II, this Court may conduct an independent review of the state-law bases asserted in defense of the court's action. *See, e.g.*, *Martin v. Hunter's Lessee*, 14 U.S. 304, 357-58 (1816) (reversing state court's title determination under state law, where necessary to proper construction and application of treaty); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.9 (1981).

tion of presidential electors. *See, e.g.*, Pet. App. 8a (rejecting "a hyper-technical reliance upon statutory provisions"); *id.* at 31a ("Technical statutory requirements must not be exalted over the substance of this right [of the citizens to vote]"); *id.* at 36a ("the will of the electors supersedes any technical statutory requirements"). Whether or not that approach was correct as a matter of Florida law, the importance of the court's dismissive attitude toward the pronouncements of the legislature is that it demonstrates the court's failure to appreciate the restrictions imposed by Article II and the exclusivity of legislative power in regard to the manner of appointing presidential electors.

In light of the court's manifest willingness to depart from and reorder the statutory scheme in order to fulfill its vision of "the will of the people" (Pet. App. 8a), it is unsurprising that the court's decision turns the governing statutes on their head. With respect to the deadline for certifying election returns, for example, Florida law unambiguously provides that county returns "must be filed by 5 p.m. on the 7th day following the . . . general election." Fla. Stat. § 102.112(1). Even the court below acknowledged that "the deadline set forth in section 102.111(1), Florida Statutes (2000), requir[es] that all county returns be certified by 5:00 p.m. on the seventh day after an election." Pet. App. 4a. The court concluded, however, that it would "[a]llo[w] the manual recounts to proceed in an expeditious manner, rather than impos[e] an *arbitrary* seven-day deadline." *Id.* at 32a (emphasis added). Of course, it was not the court that would have been "impos[ing]" the deadline; that deadline was established by preexisting statutory law as an integral part of a carefully balanced legislative program and timetable for counting ballots and resolving disputes. Regardless of the wisdom of the court's decision to rewrite the statutory deadline, it is plain that the court substituted its judgment for that of the legislature. Although the Constitution may permit state courts to take such action as applied to the elections of state officials,

Article II precludes such judicial lawmaking in the context of appointing presidential electors.

Lest there be any doubt as to the legislative nature of the decision below, the court also adopted an entirely new, and utterly arbitrary, deadline for the submission of election returns. The court acknowledged that it was not basing this decision on any statutory provision. Pet. App. 37a-38a ("we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here"). Eschewing the "arbitrary" November 14 deadline established in advance by the legislature, the court imposed its own deadline of November 26 for the submission of county returns—a date vastly more arbitrary than the statutory deadline because the legislature's deadline was part of a carefully crafted system and timetable for protests, recounts, contests and certification. The court plucked out one date and changed it without any apparent regard for the effect of its decision on the balance of the carefully wrought legislative plan. Whether such an order is within the equitable powers of a Florida court in the ordinary course has no bearing on this case. Rather, it is clear that the court below reached out to affect the "manner" of appointing presidential electors by changing the deadline for the submission of vote tallies, and thereby arrogated to itself a power that the Constitution has instilled only in the state legislature.

The deadline for certifying election results indisputably is encompassed within the "manner" of appointing electors vested by the Constitution in the state legislatures. *See Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936); *McClendon v. Slater*, 554 P.2d 774, 776-77 (Okla. 1976). Each State—and, often, the political subdivisions within the States—conduct elections in different ways. Regardless of the voting mechanism, however, the need for finality dictates that a deadline be set for certifying the returns. The Florida legislature has established precisely such a deadline: 5:00 p.m. on the 7th

day following the election. As noted above, that deadline is tied to other procedures and deadlines and ultimately to the certification and appointment of the electors.

The Florida Supreme Court did not even attempt to rest its exercise of judicial power over the manner of appointing electors on any statute or other delegation of such power to it by the legislature. Instead, the court repeatedly invoked the Florida constitution as "[t]he abiding principle governing all election law in Florida." Pet. App. 14a; *see also*, *e.g.*, *id.* at 30a. While that might well be an acceptable source of law for an election of a state official, it cannot suffice with respect to the appointment of presidential electors. As this Court has explained, "[t]his power [to determine the manner of appointing electors] is conferred upon the legislatures of the States by the Constitution of the United States, *and cannot be taken from them or modified by their State constitutions*." *McPherson*, 146 U.S. at 35 (emphasis added). The Florida Supreme Court's decision, which disregards this principle, cannot be reconciled with the framework imposed on the States by Article II.

The particular provisions of the state constitution on which the Florida Supreme Court relied highlight the federal constitutional error in its analysis. The court stressed that "[t]he right of suffrage is the preeminent right contained in the [state] Declaration of Rights," and asserted that "[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage." Pet. App. 29a-30a. In light of this construction, the court held that the Elections Canvassing Commission could not reject untimely returns. *Id.* at 31a-32a. But, as the early practice demonstrates (and this Court's decision in *McPherson* confirms), there is *no* "right of suffrage" under the *federal* Constitution in the context of selecting presidential electors. The state legislatures may make such ap-

pointments themselves, without conducting any election whatsoever. Indeed, Florida itself did so in 1868.

It thus makes no difference to the constitutional analysis whether the Florida Supreme Court's decision to preclude the Secretary of State from certifying the election on November 14, or to establish a new certification deadline of November 26, was mandated or inspired by the state constitution. In the absence of an express delegation from the legislature, the court was precluded from issuing *any* directive not founded in preexisting law that could affect the manner of appointing presidential electors. The court's order in this case clearly had that effect. It is, therefore, unconstitutional.[22]

D. As A Result Of Its Unconstitutional Arrogation Of Power, The Florida Supreme Court's Decision Is A Nullity

This Court has never before confronted the situation in which a state court exerted authority expressly withheld from it by Article II of our Constitution, and thus has not had the opportunity to consider the correct remedy for such an act. Two related lines of precedent indicate, however, that the proper remedy for the Florida Supreme Court's violation of Article II is nullification of its attempt to interfere in the manner in which Florida's electors are appointed.

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22 Contrary to the Gore respondents' suggestion, enforcing Article II in this case would not lead to the "federalization" of all state-court decisions in the election context. *See* Gore Opp. 17. In some cases, there might be legitimate questions of state law arising from the implementation of a legislatively authorized scheme of appointing electors. This case, however, does not even present a close call. The court below strayed so far from the framework established by the Florida legislature that its unconstitutional exercise of authority over the electoral process is patent.

First, the Court has long held that "the Constitution and constitutional laws of the [United States are] the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation." *Ex Parte Siebold*, 100 U.S. 371, 399 (1879); *see also Milliken v. Bradley*, 418 U.S. 717, 744 (1974). A state law that conflicts with the Constitution is void. *E.g.*, *Gunn v. Barry*, 82 U.S. 610, 623-24 (1872). As discussed above, the Florida Supreme Court's decision to waive the statutory deadlines for certifying the election results, and to impose a deadline of its own invention, amounts to new rules of law. The court was without constitutional authority to announce such rules, however, because Article II vests exclusive authority over such matters in the Florida legislature. As a result, the Florida Supreme Court's efforts at judicial legislation are void. "An unconstitutional law is void, and is as no law." *Siebold*, 100 U.S. at 376; *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759-60 (1995) (Scalia, J., concurring).

Second, it is well-established that an act by a state official in violation of duties or obligations imposed by the Constitution is *ultra vires* and, thus, void. *See Ex Parte Young*, 209 U.S. 123, 159-60 (1908). "The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." *Siebold*, 100 U.S. at 392. Because the Constitution vests exclusive authority over the manner of appointing electors in the legislature, and because that authority has not been delegated by the Florida legislature to the judiciary, the state supreme court's intrusion into the electoral process was *ultra vires*. *Cf. Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*"). The supreme court's decision, therefore, should be vacated and given no force or effect.

See, e.g., California v. Superior Court, 482 U.S. 400, 412 (1987) (reversing without remand California Supreme Court decision in contravention of the Extradition Act, which implements the Extradition Clause of Article IV).

Vacatur of the decision below would confirm that the Secretary of State and the Elections Canvassing Commission have the authority—expressly delegated to them by the legislature—to certify the results of the election based on returns received by the statutory deadline of November 14. And, because the state supreme court's injunction precluding the responsible executive branch officials from doing so violated the Constitution and is, therefore, a legal nullity, those officers may exercise their discretion to certify the election *nunc pro tunc* to that date. If this Court vacates the judgment below and the Elections Canvassing Commission takes such action, some of the recently filed election challenges to the election results may be mooted.[23] In any event, enforcing the constitutional structure in this case will imbue this election with the finality that the carefully wrought federal system was meant to secure.

CONCLUSION

The judgment of the Supreme Court of Florida should be vacated.

Respectfully submitted.

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[23] For example, the Vice President has complained that the Miami-Dade County Canvassing Board improperly stopped its manual recount after the state supreme court announced its November 26 certification deadline. But the Miami-Dade recount had not even *begun* until after the statutory deadline had expired on November 14, and the Supreme Court of Florida opened the door to such a recount on November 17.

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APPENDIX

STATUTORY APPENDIX

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article II, § 1, cl. 2

Presidential Electors.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

* * * * *

Article II, § 1, cl. 4

Presidential Electors.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

* * * * *

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

Amendment XII

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same

state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

* * * * *

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

3 U.S.C. 1

§ 1. Time of appointing electors

The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

3 U.S.C. 2

§ 2. Failure to make choice on prescribed day

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

* * * * *

3 U.S.C. 5

§ 5. Determination of controversy as to appointment of electors

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest con-

cerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

3 U.S.C. 6

§ 6. Credentials of electors; transmission to Archivist of the United States and to Congress; public inspection

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvas or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title [3 USCS § 7] to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist

of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

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3 U.S.C. 15

§ 15. Counting electoral votes in Congress

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes be entered

on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when the agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported

by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

FLORIDA STATUTES

TITLE 9—ELECTORS AND ELECTIONS

CHAPTER 102—CONDUCTING ELECTIONS AND ASCERTAINING THE RESULTS

* * * * *

102.111 Elections Canvassing Commission.

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all coun-

ties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.

(2) The Division of Elections shall provide the staff services required by the Elections Canvassing Commission.

102.112 Deadline for submission of county returns to the Department of State; penalties.

(1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.

(2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds. Such fines shall be deposited into the[1] Election Campaign Financing Trust Fund, created by § 106.32.

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[1] The trust fund expired, effective November 4, 1996, by operation of § 19(f), Art. III of the State Constitution.

(3) Members of the county canvassing board may appeal such fines to the Florida Elections Commission, which shall adopt rules for such appeals.

* * * * *

102.141 County canvassing board; duties.

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(4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-half of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-half of a percent or less of the votes cast on such measure, the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure. A recount need not be ordered with respect to the returns for any office, however, if the candidate or candidates defeated or eliminated from contention for such office by one-half of a percent or less of the votes cast for such office request in writing that a recount not be made. Each canvassing board responsible for conducting a recount shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

* * * * *

102.166 Protest of election returns; procedure.

(1) Any candidate for nomination or election, or any elector qualified to vote in the election related to

such candidacy, shall have the right to protest the returns of the election as being erroneous by filing with the appropriate canvassing board a sworn, written protest.

(2) Such protest shall be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later.

(3) Before canvassing the returns of the election, the canvassing board shall:

(a) When paper ballots are used, examine the tabulation of the paper ballots cast.

(b) When voting machines are used, examine the counters on the machines of nonprinter machines or the printer-pac on printer machines. If there is a discrepancy between the returns and the counters of the machines or the printer-pac, the counters of such machines or the printer-pac shall be presumed correct.

(c) When electronic or electromechanical equipment is used, the canvassing board shall examine precinct records and election returns. If there is a clerical error, such error shall be corrected by the county canvassing board. If there is a discrepancy which could affect the outcome of an election, the canvassing board may recount the ballots on the automatic tabulating equipment.

(4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the

results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.

(c) The county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make a reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount.

(d) The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

(5) If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:

(a) Correct the error and recount the remaining precincts with the vote tabulation system;

(b) Request the Department of State to verify the tabulation software; or

(c) Manually recount all ballots.

(6) Any manual recount shall be open to the public.

(7) Procedures for a manual recount are as follows:

(a) The county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots. A counting team must have, when possible, members of at least two political parties. A candidate involved in the race shall not be a member of the counting team.

(b) If a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be pre-

sented to the county canvassing board for it to determine the voter's intent.

(8) If the county canvassing board determines the need to verify the tabulation software, the county canvassing board shall request in writing that the Department of State verify the software.

(9) When the Department of State verifies such software, the department shall:

(a) Compare the software used to tabulate the votes with the software filed with the Department of State pursuant to § 101.5607; and

(b) Check the election parameters.

(10) The Department of State shall respond to the county canvassing board within 3 working days.

* * * * *

102.168 Contest of election.

(1) Except as provided in § 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

(2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the circuit court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to § 102.166(1), whichever occurs later.

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds for contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the de-

fendant of the particular proceeding or cause for which the nomination or election is contested.

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

* * * * *

FLORIDA STATUTES

TITLE 9—ELECTORS AND ELECTIONS

CHAPTER 106—CAMPAIGN FINANCING

* * * * *

106.23 Powers of the Division of Elections.

(1) In order to carry out the responsibilities prescribed by § 106.22, the Division of Elections is empowered to subpoena and bring before its duly authorized representatives any person in the state, or any person doing business in the state, or any person who has filed or is required to have filed any application, document, papers, or other information with an office or agency of this state or a political subdivision thereof and to require the production of any papers, books, or other records relevant to any investigation, including the records and accounts of any bank or trust company doing business in this state. Duly authorized representatives of the division are empowered to administer all oaths and affirmations in the manner prescribed by law to witnesses who shall appear before them concerning any relevant matter. Should any witness fail to respond to the lawful subpoena of the division or, having responded, fail to answer all lawful inquiries or to turn over evidence that has been subpoenaed, the division may file a complaint before any circuit court of the state setting up such failure on the part of the witness. On the filing of such complaint, the court shall take jurisdiction of the witness and the subject matter of said complaint and shall direct the witness to respond to all lawful questions and to produce all documentary evidence in the witness's possession which is lawfully demanded. The failure of any witness to comply with such order of the court shall constitute a direct and criminal contempt of court, and the court shall punish said witness accordingly. However, the refusal by a witness to answer inquiries or turn over evidence on the basis that such testimony or material will tend to incriminate such witness

shall not be deemed refusal to comply with the provisions of this chapter.

(2) The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, political committee, committee of continuous existence, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws with respect to actions such supervisor, candidate, local officer having election-related duties, political party, committee, person, or organization has taken or proposes to take. A written record of all such opinions issued by the division, sequentially numbered, dated, and indexed by subject matter, shall be retained. A copy shall be sent to said person or organization upon request. Any such person or organization, acting in good faith upon such an advisory opinion, shall not be subject to any criminal penalty provided for in this chapter. The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought, unless material facts were omitted or misstated in the request for the advisory opinion.

No. 00-836

Supreme Court, U.S.
FILED
NOV 23 2000
CLERK

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT PALM BEACH COUNTY CANVASSING BOARD

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QUESTIONS PRESENTED

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

3. What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?

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OPINION BELOW

The opinion of the Supreme Court of Florida (Pet. App. 1a-38a) is unreported as yet, but available on Westlaw at 2000 WL 1725434. The orders of the Circuit Court for the Second Judicial Circuit in and for Leon County, Florida (Pet. App. 43a-51a) are not reported.

JURISDICTION

The final judgment of the Supreme Court of Florida was entered on November 21, 2000. This Court has jurisdiction to review a final judgment of the highest state court, under 28 U.S.C. § 1257. However, because the recounts that were permitted by the decision below have been completed, and the petitioner was certified on November 26, 2000 as the winner of the Florida election, the relief sought by the petitioner — to have been certified as the winner on November 14, 2000 — is superfluous, and the Article III, § 2 case or controversy requirement necessary for this Court's jurisdiction is questionable.

STATEMENT

The primary parties, Governor Bush and Vice President Gore, have submitted, and will submit, extensive statements of the events since November 7, 2000. The Palm Beach County Canvassing Board submits this abbreviated statement of the actions it took to discharge, in a non-partisan way, its statutory duties — actions that led to the decision below.

Following the November 7, 2000 general election the Palm Beach County Canvassing Board granted a request by the Florida Democratic Party for a manual recount of the

votes cast for President and Vice President, as set forth in section 102.166(4)(a), Florida Statutes.[1] Pursuant to section 102.166(4)(d), the Canvassing Board conducted a manual recount of just over 1% of the total votes cast.[2] Based on the results of that limited manual recount, the Canvassing Board exercised its statutory option to conduct a manual recount of the entire County.[3]

---

1. Subsection (4)(a) provides:

> Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates' names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

2. Subsection (4)(d) provides:

> The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

3. Subsection (5) provides three options following the initial limited manual recount:

> If the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall:
>
> (Cont'd)

After beginning the manual recount, the Palm Beach County Canvassing Board sought and obtained opinions from both the Secretary of State of Florida and the Attorney General of Florida as to as to whether the Canvassing Board could, in the circumstances presented and consistent with section 102.166(5), Fla. Stat., conduct a manual recount of the votes cast for the offices of President and Vice President of the United States in the November 7, 2000 general election, in accordance with the Board's unanimous vote to do so.[4]

The Secretary of State, through L. Clayton Roberts, Director, Division of Elections, provided an advisory opinion on November 13, 2000 (J.A. 56-58), which "construed the

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(Cont'd)

> (a) Correct the error and recount the remaining precincts with the vote tabulation system;
>
> (b) Request the Department of State to verify the tabulation software; or
>
> (c) Manually recount all ballots.

4. Specifically, the Board asked:

> Would a discrepancy between the number of votes determined by a tabulation system and by a manual recount of four precincts be considered an "error in voting tabulation which could affect the outcome of" an election within the meaning of Section 102.166(5), Florida Statutes thereby enabling the canvassing board to request a manual recount of the entire county, or are "errors" confined to errors in tabulation system / software?

J.A. 47.

language 'error in vote tabulation' [in § 102.166(5)] to exclude the situation where a discrepancy between the original machine return and sample manual recount is due to the manner in which a ballot has been marked or punched." Pet. App. 10a. That advisory opinion, indicating that the recount in Palm Beach County was unauthorized, was binding on the Palm Beach County Canvassing Board "until amended or revoked." § 106.23(2), Fla. Stat.

The next day, the Attorney General issued an opinion disagreeing with the Secretary of State's statutory analysis and concluding that a manual recount was not limited to situations presenting errors in the vote tabulation system or software. *See* November 14, 2000 Attorney General Opinion 2000-65. (J.A. 40-46). Faced with the binding advisory opinion and a conflicting Attorney General Opinion, on November 14, 2000 the Palm Beach County Canvassing Board voted to suspend its manual recount pending a judicial determination of its rights and responsibilities under the law. The Canvassing Board filed a Petition for Extraordinary Writ in the Supreme Court of Florida, asking that Court to provide the definitive statutory interpretation. (Pet. App. 2a, n.1). Based on an Interim Order of the Supreme Court of Florida stating that there was no impediment to the vote count continuing (Pet. App. 41a), and the opinion below issued November 21, 2000 (Pet. App. 1a-38a) resolving the issue contrary to the view of the Florida Secretary of State, the Canvassing Board resumed its manual recount and completed it on the evening of November 26, 2000.

Earlier, in order to avoid the certification of statewide election results without the Palm Beach County tabulation, the Palm Beach County Canvassing Board intervened on November 13, 2000 in a lawsuit brought by Volusia County

against the Secretary of State to enjoin her from ignoring results submitted after November 14, 2000. Pet. App. 4a. The decision below details the chronology of that action, which ultimately joined with the original action brought by the Canvassing Board and resulted in the decision below. Pet. App. 4a-8a. That decision, which permitted the recounted vote to be considered, and set the certification date of November 26, 2000 to accommodate the need for the manual recount, is the decision that the petitioner seeks to set aside.

SUMMARY OF ARGUMENT

The Supreme Court of Florida's decision reconciling conflicting provisions of the Florida Election Code did not establish a new rule of law; did not depart from well established Florida law; did not violate the Due Process Clause or 3 U.S.C. § 5; and did not conflict with Article II, Section 1, clause 2 of the Constitution.

The decision of the Supreme Court of Florida was a classic example of a court making sense out of a conflicting statutory election code that threatened to discount the right to vote, one of the most fundamental of rights.

The decision below utilized standard principles of statutory construction to alleviate the tension between a 1951 statute, which mandated the state certification of election results on the seventh day following an election, and a 1989 statute, which permitted later filed local returns to be included for certification. Since Florida law authorized manual recounts, and those recounts could take longer than seven days, the Supreme Court of Florida harmonized the conflict by setting a certification date — November 26, 2000 — that allowed each actor to complete his or her task: the

Canvassing Board could count; the voter could be protected; the Secretary of State could certify; a dissatisfied candidate or voter could contest the election after certification. All of this was pursuant to statutes enacted prior to November 7, 2000.

Therefore, the decision below was in accord with 3 U.S.C. § 5, which requires states to resolve controversies relating to the appointment of electors "under laws enacted prior to" election day, and the decision below was consistent with the Florida statutory law, thus guaranteeing that Florida's electors shall be appointed "in such Manner as the Legislature thereof may direct." Article II, Section 1, clause 2 of the Constitution.

The Supreme Court of Florida decision should be affirmed.

ARGUMENT

I.

THE DECISION OF THE SUPREME COURT OF FLORIDA, RECONCILING THE STATUTORY AMBIGUITIES IN THE FLORIDA ELECTION CODE, DID NOT VIOLATE 3 U.S.C. § 5 OR THE DUE PROCESS CLAUSE

Karl Llewellyn, speaking of courts and statutes, wrote:

> But a court must strive to make sense *as a whole* out of our law *as a whole*. It must, to use [Jerome] Frank's figure, take the music of any statute as written by the legislature; it must take

> the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and to play it in harmony with the other music of the legal system.

KARL LLEWELLYN, THE COMMON LAW TRADITION 373 (1960) (emphasis in original). The Supreme Court of Florida's decision achieved that harmonious result.

The Supreme Court of Florida reconciled "the time frame for conducting a manual recount under section 102.166(4) . . . with the time frame for submitting county returns under sections 102.111 and 102.112." Pet. App. 17a.

Under section 102.111(1), enacted in 1951, if the election returns of a county "are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored and the results shown by the returns on file shall be certified." Pet. App. 22a. But under section 102.112(1), enacted in 1989, if county returns are not received by the Department of State by 5 p.m. on the 7th day following the general election, "such returns may be ignored and the results on file at that time may be certified by the department." Under 102.112(2), also enacted in 1989, the "department shall fine each [county canvassing] board member $200 for each day such returns are late."

The "shall — may" conflict becomes critical when the manual recount provisions of section 102.166 are triggered. As the Supreme Court of Florida explained, because a manual recount can be requested as late as "the sixth day following the election" (Pet. App. 21a), the seven day limitation could render the recount provision meaningless: "logic dictates that

the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days." Pet. App. 21a.

The Supreme Court of Florida's reconciliation of the conflicting statutes utilized accepted canons of statutory construction: a specific statute controls a general statute; a more recently enacted statute controls an older statute; construction of a statute should not "render meaningless or absurd any other statutory provision;" and "related statutory provisions must be read as a cohesive whole." Pet. App. 24-25a. And these rules were applied on the canvas of the right to vote, the most fundamental of rights. *See Burdick v. Takushi*, 504 U.S. 428 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.' " *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184. . . . (1979)").

It is undisputed that the Florida statutes giving rise to this case, and the statute providing for election contests, section 102.168, Fla. Stat., were enacted prior to November 7, 2000. That alone should end the claim of alleged conflict with Title 3 U.S.C. § 5, because the safe harbor provided by the statute is premised upon the existence of "laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such state, by judicial or other methods or procedures. . . ." Nevertheless, the petitioner contends that the Supreme Court of Florida's reconciliation of the statutes and setting of a November 26, 2000 certification deadline made new law, and thus violated Title 3 U.S.C. § 5:

> This arbitrary judicial departure from the well-established law of Florida — as it plainly stood prior to November 7, 2000 — is in flagrant violation of Congress' federally imposed requirement that controversy over the appointment of electors be resolved solely under legal standards "enacted prior to" the date of the election. 3 U.S.C. § 5.

Petition for Writ of Certiorari, pp. 15-16.

> Where, as here, no preexisting rule of law required (or even authoritatively authorized) the Secretary of State to waive the time limit on the facts presented, 3 U.S.C. § 5 precludes the retroactive enforcement of a new rule of law compelling that previously unknown result.

Id. at 17.

The petitioner errs in calling the Supreme Court of Florida's opinion "a new rule of law." That opinion did what a court should do: "to quarry out of a legislative text the best sense which the text permits. . . ." LLEWELLYN, *supra*, at 381. The Supreme Court of Florida carefully construed the Florida Election Code "as a whole." Pet. App. 37a. Faced with a 1951 statute's mandate to ignore an eighth (or later) day return (a mandate that could not be followed anyway because overseas voters have a 10-day window, *see* Pet. App. 27a, n.47), the court sought to apply the Code in a sensible way.

> [I]ncreasingly, as any statute gains in age [,] its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is not properly for the sense originally intended by the statute, for the sense

> originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation. Broad purposes can indeed reach far beyond details known or knowable at the time of drafting.

LLEWELLYN, *supra* at 374 (emphasis in original).

That judicial process is not "legislative;" it is quintessential common law judging — "the power to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The Supreme Court of Florida did adhere to preexisting law. Making sense out of that law does not, as the petitioner says, constitute "*post hoc* standards announced for the first time some two weeks after the election." Pet., p. 16, n. 4. What the Supreme Court of Florida did was not legislative, it was ordinary judging.

> More specifically, the judge is uniquely competent to place statutes in their temporal setting, taking account of what happens both before and after a statute is passed. Moreover, the exercise of this competence inevitably results from applying texts to facts, an exercise that forces the judge to think about how a text's meaning interacts with the past and the future (about the statute's intent). Once this thought process begins, judgment requires thinking about substantive values and comparative institutional competence; however, these are the results of ordinary judging. . . .

WILLIAM D. POPKIN, STATUTES IN COURT, THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 246 (1999).

The petitioner's premise — that "the Supreme Court of Florida has authorized a clear departure from the established legal requirements set forth by the Florida legislature that were in place on November 7" — is based upon a misconception of the judicial function. One role of the courts is "to make sense rather than nonsense out of the corpus juris." *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 101 (1991). Justice Frankfurter put it another way, quoting Lord Justice Denning in *Seaford Court Estates, Ltd. v. Asher* [1949] 2 K.B. 481, 499 (C.A.): " 'A judge must not alter the material of which it [an act] is woven, but he can and should iron out the creases.' " Felix Frankfurter, *A Symposium on Statutory Construction, Foreward*, 3 Vand. L. Rev. 365, 367 (1950).

The Supreme Court of Florida tailored its decision to preserve every aspect of the Florida Election Code. The opportunity to ensure the accuracy of the vote was preserved. The duty of the Secretary of State to certify election results was preserved. The opportunity to lodge a statutory post-certification election contest was preserved.[5]

The Supreme Court of Florida decision was not arbitrary and it was not a departure from the well-established law of Florida. Most importantly, it was not in violation of due process or the 3 U.S.C. § 5 requirement that controversy over the appointment of electors be resolved solely under laws "enacted prior to" the date of the election.

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5. The *amicus curiae* brief of the Florida Senate and House of Representatives, p. 12, contends that by allowing a later certification date, "the court increased the likelihood that such contests would not be finally adjudicated" by December 12, 2000 and that "may constitute an important obstacle and determent to full and fair adjudication of such contests." The speculativeness of that submission is obvious from its equivocal language.

II.

THE SUPREME COURT OF FLORIDA OPINION DID NOT VIOLATE ARTICLE II, § 1, CL. 2 OF THE CONSTITUTION

Article II, § 1, cl. 2 provides that Electors shall be appointed "in such manner as the Legislature thereof may direct." The petitioner contends that the Supreme Court of Florida "has seen fit to revise the 'manner' in which Florida's electors are chosen by directing the Secretary of State to consider results from those counties that are conducting manual recounts. . . ." Under the petitioner's theory, no Florida court could reconcile conflicting state election statutes that implicate the choice of electors: "Had the Florida legislature seen fit to vest the decision in the hands of the judiciary, presumably it could have done so, but the simple fact is that it did *not* do so." Pet., p. 20 (emphasis in original).

The simple fact is, of course, that the Florida Constitution and the Florida statutes provide Florida courts with jurisdiction to resolve all controversies. Article V, Fla. Const.; Ch. 25, Ch. 26, Ch. 35, Fla. Stat. Election law disputes are just one *genre* of controversy suited to judicial review. There is nothing extraordinary about the Supreme Court of Florida's assumption of jurisdiction in this case. Indeed, if the petitioner were correct, election law disputes touching upon presidential electors could only be addressed *before* an election. That cannot be, because election disputes only occur *after* an election.

The petitioner's flawed view of the judicial function spoils his argument under Article II, § 1, cl. 2, just as it did under Title 3 U.S.C. § 5.

Florida laws enacted prior to November 7, 2000 governed this election and disputes arising from that election. The Supreme Court of Florida's resolution of the subsequent-to-election dispute was not a legislative act, nor was it contrary to the "manner as the Legislature thereof may direct." Art. II, § 1, cl. 2. While this election dispute may be extraordinary, the Supreme Court of Florida's decision was ordinary judging, and violated no federal constitutional or statutory principles.

III.

IF THIS COURT FOUND THAT THE DECISION OF THE SUPREME COURT OF FLORIDA DOES NOT COMPLY WITH 3 U.S.C. § 5, THE CONSEQUENCES WOULD BE NIL

If the Supreme Court of Florida decision were reversed, there would be no immediate consequences. The Secretary of State's certification of election results occurred on November 26, 2000. The petitioner sought to be certified as the election winner on November 14, 2000. His goal was delayed, not denied. Setting aside the Supreme Court of Florida decision would not change the certified election outcome. Indeed, the question posed in the jurisdiction portion of this brief seems pertinent; since certification has occurred, the remedy sought by petitioner is of little consequence now.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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NOV 27 2000

Supreme Court U.S.
FILED
NOV 27 2000

No. 00-836

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE W. BUSH,
Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, et al.
Respondents.

On Petition For Writ of Certiorari
to the Florida Supreme Court

BROWARD COUNTY CANVASSING BOARD'S AND BROWARD COUNTY SUPERVISOR OF ELECTION'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

After the November 7, 2000 general election, the Broward County Canvassing Board (the "Board") conducted a statutorily-mandated machine recount of the votes cast for President/Vice President. Consistent with the requirements of §102.166(4), Florida Statutes, the Board then conducted a limited manual recount of the votes cast in three precincts, which comprised more than one percent (1%) of the total votes cast in Broward County. The Board determined that the results of the limited manual recount indicated an error in vote tabulation that could affect the outcome of the election. As a result of this determination, the Board was statutorily required, pursuant to §102.166(5)(c), Florida Statutes, to conduct a county-wide manual recount of all ballots in Broward County cast for President of the United States.

The Board began its full manual recount on Wednesday, November 15, 2000, at 2:00p.m.. From that date, the Board worked continuously, without taking any days off, even for the Thanksgiving holiday. Initially, the Board, as well as hundreds of county employees and party observers, worked from 8:00 a.m. until 6:00 p.m. each day, but the Board increased its hours even further as the recount continued, working several days from 8:00 a.m. until 11:00 p.m. After working eleven (11) consecutive days, the manual recount concluded on Saturday, November 25, 2000 shortly before midnight.

As stated in the certifications attached hereto as Exhibits "A" and "B", which were filed with the Secretary of State on November 8, 2000 and November 26, 2000, respectively, the manual recount resulted in One Thousand Seven Hundred Twenty-One (1,721) additional valid votes being included in the vote totals for Broward County.

ARGUMENT

I. THE FLORIDA SUPREME COURT'S HOLDING DOES NOT VIOLATE THE DUE PROCESS CLAUSE OR 3 U.S.C. §5.

Under 3 U.S.C. §5, a determination regarding the appointment of presidential electors pursuant to Florida's Election Code "shall be conclusive" provided:

1. The applicable provisions of the Florida Election Code were "enacted prior to the day fixed for appointment of the electors;" and
2. The determination is made by December 12, 2000, which is six days prior to the meeting of the electors under 3 U.S.C. §7 (2000).

A. The Supreme Court of Florida Did Not Rewrite the Applicable Provisions of the Florida Election Code.

The Florida Supreme Court decision did not impose post-election judicial limitations on state executive officials. Nor did it impose judicially created standards for the determination of controversies concerning the appointment of presidential electors. Rather, the Florida Supreme Court's decision interpreted existing Florida statutes as required to harmonize the various provisions of the Florida Election Code so as to give effect to the overall purpose and intent of Florida's election laws. In the Court's own words, the decision of the Florida Supreme Court was "consistent with the Florida election scheme."

It has long been the law in Florida that wherever it is possible to do so, a court must construe statutory sections so they operate in harmony with each other. *Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249 (Fla. 1987). In this case, the Florida Supreme Court's decision does exactly that, squaring the express language of Florida's statutory provisions governing the election process with the intent and purpose behind those provisions. At the same time, the Florida Supreme Court ensured that each vote in counties utilizing manual recounts can be accurately counted, and that Florida's ability to appoint its electors by December 12, 2000 will not be jeopardized.

By providing that the Secretary of State was required to accept amended certifications from the county canvassing boards, the Florida Supreme Court's holding did nothing more than interpret Florida law in a manner to allow for what was intended-- to permit enough time for pre-certification manual recounts as well as post-certification contests. The Court recognized that Florida's Election Code contains no deadlines for filing corrected, amended or supplemental vote returns. The Court further recognized that while Florida statutes specifically provide for manual recounts, the recounts could not be accomplished in larger counties, like Broward County, within the seven (7) day period contained in §102.166, Florida Statutes (2000).

This latter recognition was confirmed by the actual experience of the Broward County Canvassing Board, which required eleven (11) consecutive arduous days, working long hours without a break, to accurately complete the recount of approximately 588,000 ballots in Broward County. As a result, more than 1,700 votes from Broward County not previously counted were included in the final vote total certified by the Secretary of State on November 26, 2000. The inclusion of those votes is what was intended by the Legislature when it provided for a procedure for manual recounts. That goal was accomplished in Broward County, with absolutely no impact on any other part of the election process.

The provisions of the Florida Election Code, upon which the manual recount vote total was based, were enacted by the Florida Legislature prior to the day fixed for appointment of the electors. As such, the final vote totals from Broward County was determined consistent with 3 U.S.C. §5.

B. Contrary to Petitioner's Assertions, Neither the Decision of the Supreme Court of Florida Nor the Board's Manual Recount Thwart the Will of the Electorate.

In its introduction, Petitioner asserts that the decision of the Supreme Court of Florida "appears designed to thwart the will of the electorate . . ." To the contrary, the will of the electorate can only be determined by counting all votes as to which the clear intent

of the voter can be determined. Given the problems clearly evident with machine vote tabulation in Broward County, the Board determined that the manual recount was necessary to determine the true vote totals.

Petitioner further argues that the efforts of the Broward County Canvassing Board were "unrestrained by statutory guidance[.]" This allegation is simply not true. Florida Statute §101.5614(5) provides: "No vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board." This statutory mandate guided all decisions of the Broward County Canvassing Board.

Petitioner also asserts that the act of manually recounting ballots, which requires handling of the ballots, undermined the physical integrity of the ballots. There is no evidence before this Court to support that bald assertion. Petitioner's failure to cite to any record support equates to an admission that none exists.

II. THE FLORIDA SUPREME COURT'S DECISION IS NOT INCONSISTENT WITH ARTICLE II, SECTION 1, CLAUSE 2 OF THE CONSTITUTION.

As indicated in Section I of this Response, the Florida Supreme Court decision is consistent with Florida Statutes enacted before the election was held. The argument in Section I is incorporated here as Broward County Canvassing Board's response to Question II presented by the Petitioner. It is further submitted that, based on those arguments, the Florida Supreme Court's decision is not inconsistent with Article II, Section 1, clause 2 of the Constitution.

III. IF THIS COURT WERE TO FIND THAT THE FLORIDA SUPREME COURT'S DECISION DOES NOT COMPLY WITH 3 U.S.C. §5, MORE THAN 1,700 VOTERS WOULD BE NEEDLESSLY DISENFRANCHISED.

The Broward County Canvassing Board has invested substantial time and effort in painstakingly examining each ballot cast in Broward County to determine the true intent of each voter and to reach an

accurate count of votes cast. The Board's efforts were consistent with Florida law and pursuant to the clear direction of the Florida Supreme Court.

The direct result of any decision reversing the Florida Supreme Court will be the disenfranchisement of more than 1,700 Broward County voters who validly and lawfully filled in ballots which would be rendered meaningless solely because of the limitations of the county's machine counting system.

CONCLUSION

Wherefore the Broward County Canvassing Board respectfully requests this Court deny the writ of certiorari requested by Petitioners, allowing Broward County's amended certification to stand.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 30 2000
CLERK

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On Writ of Certiorari
to the Supreme Court of Florida

REPLY BRIEF OF RESPONDENTS AL GORE, JR., AND FLORIDA DEMOCRATIC PARTY

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November 30, 2000

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REPLY BRIEF FOR RESPONDENTS AL GORE, JR., AND THE FLORIDA DEMOCRATIC PARTY

Barely four days after this Court granted review in this case, petitioner has abandoned the principal ground on which his Petition for Certiorari rested: his assertion that 3 U.S.C. § 5 "requires" the States to act in a particular way in resolving controversies over the appointment of electors. Pet. i (Question 1); *id.* at 13, 16 n.4, 18. Petitioner now concedes that the statute does not *mandate* anything but simply sets forth a safe harbor protection against possible (currently only hypothetical) disputes in the Electoral College. Pet. Br. 17, 29.

While this concession all but demolishes petitioner's case, it does not prevent him from making a series of remarkable requests of this Court.

To begin with, he asks this Court to review a state-law claim involving garden variety principles of statutory interpretation. He mischaracterizes the Florida Supreme Court's decision, all but ignoring a central provision of the Election Code governing manual recounts. Yet in the end, as an examination of his brief will reveal, petitioner's argument of usurpation rests on that portion of the state court's decision determining the scope of the Secretary of State's discretion under a Florida statute to ignore ballots that were being counted pursuant to another statute's direction.

That decision was as routine as petitioner's request for federal court intervention is remarkable. Yet, perhaps because he recognizes that the decision below presents such a weak case for a claim of judicial "legislation," petitioner makes the implausible contention that *any* state judicial decision in this context – and, by implication, any state attorney general opinion or administrative ruling – is suspect if it is not "dictated by" existing statutes. Pet. Br. 21. To implement this federal judicial superintendence over each State's processes for choosing electors, petitioner would have the federal courts draw upon *Teague* v. *Lane*, 489 U.S. 288 (1989), not to *shield* state courts from federal intrusion as *Teague* sought to do but – standing *Teague* on its head – to use it as a sword to cut down state court rulings construing election statutes as applied to presidential

electors. Any such attack on the judicial function would disrupt state government by crippling the process of legislative interpretation at the time it is needed most.

To make so weak an argument might seem barely worth the candle until one sees petitioner's final request: He seeks a form of relief to which he could not possibly be entitled – vacatur. He says that such relief will "imbue the election with * * * finality," Pet. Br. 50, but he fails to explain how it could. Petitioner appears to seek nothing less from this Court than a declaration not only that the decision below was wrong, but that the Florida vote was certified on November 14 – not when it actually was, on November 26 – so that he can argue elsewhere that respondents' post-certification challenges to the election results should be tossed out as untimely. He seeks not just to run out the clock but, extraordinarily, to have this Court turn back the clock in pending Florida contest proceedings so that he can declare the game over.

While state courts are still struggling to determine whether all the lawfully cast ballots will be counted, petitioner seeks to secure this Court's blessing for leaving to historians the question of who garnered the most votes for President in the State of Florida on November 7, 2000.

This breathtaking combination of requests is pressed upon the Court in the name of order, finality, and the rule of law. In truth, petitioner seeks this Court's assistance in bending settled legal doctrines and deeply rooted constitutional principles, and in disregarding the plain language of congressional enactments – all based on a distorted view of the Florida Supreme Court's decision.

Ours is a different view, one that harmonizes this Court's decisions about federalism with its long-standing role in interpreting the Constitution and laws. Nothing in Article II or Title 3 prevents a state legislature from giving a state court the power to interpret its Election Code. Here, Florida's legislature did exactly that, just as many other States have. There is no basis for upsetting the decision of the Florida Supreme Court.

I. THE FLORIDA SUPREME COURT'S DECISION RECONCILING INCONSISTENT STATUTES DID NOT ENACT NEW LAW OR ABROGATE EXISTING LEGISLATION.

The Florida Supreme Court's decision was an interpretation of, not an amendment to, Florida statutes enacted prior to election day. See *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994) (when a court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. * * * Thus, it is not accurate to say that the * * * Court's decision * * * 'changed' the law that previously prevailed * * * ."). Whatever else may be said, it is clear that the Florida Election Code contains two provisions about filing deadlines, an older provision that says some late returns "shall be ignored," and a more recent one that says those returns "may be ignored." Compare Fla. Stat. § 102.111(1) with *id.* § 102.112(1). The Florida legislature exhibited its understanding of the difference between "shall" and "may" in 1989. Pet. Br. 22-23 n.6. Petitioner's effort to sweep aside any tension in the Election Code by chalking it up to "different terminology," *id.* at 4, misreads the statute and the Florida Supreme Court's opinion below.

Strikingly, petitioner's argument on the supposed errors committed by the Florida Supreme Court (Pet. Br.19-27) quotes Fla. Stats. §§ 102.111, 102.112, and 102.168, but fails even to cite the crucial statute – Section 102.166, which provides for recounts. That statute, among other things, provides that county canvassing boards "shall" conduct county-wide manual recounts when (as here) a sampling reveals errors that could have affected the election. The Florida Supreme Court was well within the bounds of ordinary statutory construction in holding that the Secretary of State did not have discretion to disregard the results of a recount that the statute requires the canvassing board to conduct. See, *e.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (rejecting "hypertechnical reading" of tax statute); *Sanderson* v. *United States*, 210 U.S. 168, 175-76

(1908) (interpreting statute to allow court to grant new trial motion beyond two-year time limit for "grant" of such motions, because the motion could be made "at the last moment before the expiration of the two years"). Nor does petitioner acknowledge the plain text of the Florida Election Code, which states that the "official return of the election" must include "write-in, absentee and manually counted results." Fla. Stat. § 101.5614(8).[1]

Petitioner complains that the Florida Supreme Court in effect changed Section 102.112 to read "may not ignore" rather than "may ignore." Pet. Br. 23 (statute "at most" "leaves the power to exercise compliance with the certification deadlines to the Secretary's discretion").[2] That accusation is incorrect. The Florida Supreme Court first held that, under the statute, the Secretary of State "is permitted to ignore the returns." Pet. App. 28a. Only then did the court examine the basis for the Secretary's decision in this case, based on the record, and hold, "consistent with the Florida election scheme," *id.* at 35a, that the reasons proffered by the Secretary for rejecting the amended vote counts were inadequate as a matter of law. *Id.* The court's

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[1] The houses of the Florida Legislature have filed a brief in support of neither party taking the view that "it appears" that "there may have been" departures from previous law in the Florida Supreme Court's decision. Fla. Legis. Br. 11. The Florida Attorney General, the state's chief law enforcement officer with the authority to issue opinions on Florida law, has taken a different view. See Fla. Att'y Gen. Br. 5-8. In any event, the Florida Constitution charges the Florida Supreme Court, not the Florida Legislature, with the ultimate duty to interpret state law. Nor are the views of the contemporary legislature entitled to any special weight with respect to the proper method of reconciling a 1951 statute (102.111) with a 1989 statute (102.112).

[2] At times, petitioner attempts to complain of a supposed change in the manner by which the manual recounts are conducted. *E.g.*, Pet. Br. 7, 25 n.8. But this Court denied certiorari in *Siegel* v. *LePore*, No. 00-837 (Nov. 24, 2000), and denied review of the question presented in this matter that related to the conduct of the manual recount. See *Bush* v. *Palm Beach County Canvassing Bd.*, No. 00-836 (Nov. 24, 2000) (Order granting certiorari). Petitioner's claim regarding the manner in which the recounts are conducted is thus outside this case altogether.

decision was a routine application of basic administrative law principles.

Petitioner focuses repeatedly on the Florida court's use of its "equitable" powers. Pet. Br. 11, 13, 21-22, 25, 26, 34, 46. But there should be no confusion. The court did not use its equitable powers in either aspect of the decision of which petitioner complains. Petitioner objects to the Florida court's holding that the November 14 deadline was not absolute – that is, that the Secretary was permitted to accept supplemental returns after November 14 – and to the court's imposition of a limit on the Secretary's discretion to "ignore" manually counted ballots submitted after that date. The court reached those two holdings on the basis of ordinary principles of statutory interpretation, not on the basis of equitable powers. Pet. App. 23a-25a, 31a-35a.

Nor is there anything to the charge that the Florida Supreme Court "amended" the statute by setting a deadline of November 26. Only after determining that the Secretary had violated the law did the court use its equitable powers to craft a remedy, in the form of new deadlines. The creation of such a remedy is an inherently judicial task, not a legislative one. In fact, the court used its equitable powers only to provide a *benefit* to petitioner in setting an outside date for the completion of the hand recounts. Respondents did not seek to have *any* deadline imposed. But the court decided, in the special circumstances of this election, to set an outside deadline for completion of the manual recounts.

The court's use of its equitable power thus worked no unfairness to petitioner. Allowing the legislature's manual recount provisions to be given effect is not like changing the rules after the game has been played. Cf. Pet. Br. 27, 28. It is instead like using a more powerful photo-finish camera – indeed, one already mandated by the legislature – to determine the winner of the race more accurately.[3]

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[3] *Carmell* v. *Texas*, 529 U.S. 513 (2000) (cited in Pet. Br. 20), involved a change in rules "advantageous only to the State, to facilitate an easier conviction." *Id.* at 1633. Here, the purpose and effect of the Florida Election

II. THE FLORIDA SUPREME COURT'S DECISION COMPLIED WITH THE SAFE HARBOR PROVISION OF 3 U.S.C. § 5.

1. Petitioner has failed to demonstrate that the Florida Supreme Court's decision would take Florida's subsequent appointment of electors outside the safe harbor of 3 U.S.C. § 5. To begin with, he continues to insist that the statute requires the Florida courts to use the *substantive rules* that were in place at the time of the election. This notion flies in the face of the statute's plain language, which provides that a safe harbor shall be given to determinations that are made "by judicial or other methods or procedures" "provided[] by laws enacted prior to" election day. 3 U.S.C. § 5. It is thus the state's *dispute resolution process*, "by judicial or other methods or procedures," that must be in place before the election is held, and that must come to a conclusion six days before the electors meet.

As demonstrated in our brief on the merits, Resp. Br. 32, Florida law undeniably meets that requirement: the dispute-resolving procedure in place on election day did not change in any way. Petitioner does not disagree but argues only that the "contention" that 3 U.S.C. § 5 is "satisfied * * * by delegating to the state courts the authority to resolve disputes concerning the appointment of electors is plainly untenable," and "would offer none of the protections that Congress sought to achieve in enacting the statute." Pet. Br. 18-19. But he does not even bother to address the statute's plain language, nor does he come to terms with the extensive legislative history demonstrating that such a delegation would precisely serve Congress's purpose. See Resp. Br. 32-33.

Nor does petitioner even succeed on his own terms in demonstrating that the decision of the Florida Supreme Court

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Code, as construed by the state supreme court, is to improve the accuracy of the vote count – not to benefit one particular side over another.

was anything more than an application of "laws enacted prior to" election day. See Part I, *supra*. While he argues at length that the decision was erroneous, he cannot demonstrate that the Florida court's decision amounted to an "enact[ment]" of a new law within the meaning of 3 U.S.C. § 5.

Because, on close examination, the decision below is a routine case of statutory interpretation, petitioner takes the extreme and remarkable position that a state court may never resolve a dispute under state law about the appointment of electors if its decision would amount to a "new rule" within the meaning of – of all cases – *Teague* v. *Lane*, 489 U.S. 288 (1989). Pet. Br. 20. While this Court should not lose sight of the fact that 3 U.S.C. § 5 is not concerned *at all* with the provenance of the *substantive* law applied by state courts, petitioner's extraordinary contention must be addressed. *Teague*, as this Court is well aware, sets out the standard for when a federal habeas court can take the extraordinary action of upsetting a state court criminal conviction on collateral review. It holds that this exceptional power may be exercised only when a decision contrary to that announced by the state court was "*dictated* by precedent." *Id.* at 301 (opinion of O'Connor, J.). *Teague* provides an appropriately narrow scope for federal court review of state court decisions. But *Teague* does not hold that "new rules" are *legislative* acts. Indeed, under *Teague* "new rules" *may* be announced by this Court on direct review of decisions of the State's highest courts. See, *e.g.*, *Johnson* v. *Texas*, 509 U.S. 350, 352 (1993). Under Article III, the federal courts are provided only with "judicial" authority; separation of powers principles prohibit them from "legislating." Yet, until now, it has never been suggested that these principles mean that federal courts cannot engage in statutory interpretation unless the result is "*dictated*" by pre-existing statutes.

Teague is animated by principles of federalism and respect for state courts as "coequal parts of our national judicial system." *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990). Petitioner would turn *Teague* on its head, transforming this rule designed to shield state courts into a sword by which the federal judiciary, in

challenges involving presidential electors, would supervise state courts' application of state law to determine whether those courts correctly discerned and applied local law. Petitioner would have the federal judiciary issue orders – pursuant to state law – regarding the details of state certification and contest procedures whenever the federal courts concluded that the state judiciary departed in any way from pre-existing state statutes. Far from honoring state courts, the *Teague* standard as applied by petitioner would trigger dramatic federal intrusion into the state judicial process. This result cannot be squared with principles of federalism or with the long history of statutory interpretation by state courts in the post-election context. It would also be contrary to the purpose of Title 3 – a statute designed to regularize the States' determination of challenges to the appointment of electors – to accord the statute this disruptive effect.[4]

2. As this Court suggested in the question it directed the parties to brief, even were this Court to find that the Supreme Court of Florida's decision took Florida's selection of electors outside the safe harbor provision, this Court could afford no judicial remedy. Section 5 does no more (and was carefully designed to do no more) than provide a State's slate of electors a safe harbor secure from challenge in Congress when the statutory prerequisites were met. The text plainly states that, "[i]f any State shall have" satisfied various criteria, its determination of its electors "shall be conclusive * * * so far as the ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5. That much is not in dispute. Indeed, petitioner has now abandoned the position he pressed just days ago that the failure to satisfy the criteria of Section 5 would entirely invalidate Florida's slate of electors.

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[4] If this Court were to decide whether 3 U.S.C. § 5 embodies a standard for determining whether a state judicial statutory interpretation is so novel as to run afoul of federal law – which respondents do not believe is necessary to resolve this case – that standard would surely display much more deference to state courts.

Petitioner's new position is that this Court should vacate the decision of the Florida Supreme Court so that "executive officials in Florida would be able to discharge all of their duties" and "Congress would be able to give conclusive effect to the official certification of the Elections Canvassing Commission." Pet. Br. 13-14. There simply is no foundation for such a request.[5] Section 6 of Title 3 requires the governor of each State to certify the State's electors based on the "final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment" – a provision that notably is not limited to state law existing prior to election day.

In addition, Congress debated the provision ultimately codified as Section 5 for more than a decade and did not adopt the remedy petitioner proposes. To the contrary, the legislative history is unambiguous that Congress intended that noncompliance with Section 5 would do *no more* than put the outlier State beyond the safe harbor its text expressly provides. See Resp. Br. 23-28 (quoting, *e.g.*, 18 CONG. REC. 75 (Dec. 9, 1886) (statement of Rep. Eden) ("The bill contemplates no exclusion of electoral votes from the count because of the failure of a State to settle disputes as to the lawful vote of the State.")). Of particular note, petitioner would have this Court adopt as a supposed remedy under Section 5 a ruling appointing electors favorable to him, directly contrary to the statutory scheme under which Congress itself must make the choice between competing slates of electors. See 3 U.S.C. § 15.[6]

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[5] Contrary to petitioner's assertion, Pet. Br. 32 n.10, decisions arising under the Extradition Clause of Article IV, § 2, cl. 2, and implementing legislation, 18 U.S.C. § 3182, preserve rather than undermine state autonomy and do not support the proposition that state electoral officials effectively act as federal "deputies." See *California* v. *Superior Court*, 482 U.S. 400, 407 (1987); *Fitzgerald* v. *Green*, 134 U.S. 377, 379 (1890).

[6] Petitioner takes irreconcilable positions with respect to Section 5. First, petitioner has maintained that 3 U.S.C. § 5 renders any method of appointing electors enacted subsequent to November 7 *invalid* as a matter of federal law. Yet he simultaneously maintains that the State Legislature may at any time appoint a slate of electors that Congress would be required to recognize.

A State's final determination made in noncompliance with Section 5's safe harbor provision would deprive the State only of the "benefit" "confer[red]" on it by Congress – the "benefit" of protection for its finally determined slate of electors from challenge in the House and Senate. Pet. Br. 17. But this Court lacks the power to reverse a State's decision to forgo a benefit the federal government need not have offered in the first place. For example, where Congress conditioned receipt of federal highway funds on States' adopting a twenty-one-year-old drinking age, this Court made clear that a decision not to do so "remain[ed] the prerogative of the State[]." *South Dakota* v. *Dole*, 483 U.S. 203, 211-12 (1987). If there had been a dispute about what a State had done and the State's highest court determined that it had adopted the younger age, it would not be entitled to the federal funds – but the state court decision plainly could not be reversed or vacated by this Court to avoid that consequence.[7] At most, then, the consequence of a determination by this Court that Section 5's conditions were not met might be to render the safe harbor provision inapplicable to Florida's selection of its electors, which might then not be "conclusive" in the event of a future dispute before Congress pursuant to 3 U.S.C. § 15.[8]

Second, petitioner asserts that this Court should construe 3 U.S.C. § 5 implicitly to confer upon federal courts the authority, untethered to either the text or the legislative history and never before suggested in an opinion of any court, to strike down a state court's interpretation of state law and potentially invalidate the slate of electors selected pursuant to state procedures under the authority of Article II, § 1. This, he maintains, is a simple matter of statutory construction. But the Florida Supreme Court's detailed analysis of the Florida Election Code, relying on settled principles of statutory construction, he regards as a lawless act of legislation.

[7] Cf. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981) ("[T]he typical remedy for state noncompliance with federally imposed conditions [on a government benefit] is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").

[8] A declaration that Florida's appointment of electors was not made subject to a "final determination" deemed "conclusive" by the statute might not have even that consequence if, in the end, the outcome of this election is not affected by the action of the Supreme Court of Florida because the final margin of victory proves to be greater than any shift in the vote count attributable to it.

Petitioner objects to this conclusion because, he argues, the Florida judiciary should not be able to prevent the State from obtaining the conclusive presumption set out in Section 5. Pet. Br. 31. He argues that it would frustrate Congress's purpose if state courts could issue "binding orders" that would deprive the State of the protection of Section 5. *Id.* at 30.

To begin with, this concern simply reflects his misreading of the statute. The presumption attaches whenever the State's dispute resolution process was set up before the election, not whenever a court that is part of that process adheres to any particular provision of "pre-existing" law. As a result, the judiciary *cannot* prevent the State from obtaining the protection offered by the statute by making a novel but routine construction of statutory gaps and ambiguities – so the decision below certainly could not have the effect of taking Florida outside the statute's safe harbor. But, in any event, petitioner is simply stating a complaint about the nature of state government. Section 5 leaves the choice of how to proceed to the States and, as this Court long ago observed, "[a] State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." *Ex parte Virginia*, 100 U.S. 339, 347 (1879). Just as it would be a matter of indifference as far as federal law were concerned whether a State adopted an under-twenty-one drinking age as a result of legislative or judicial action, so it would be a matter of indifference to federal law precisely which branch of a State's government had acted in a way that prevented the State from meeting the statutory condition of 3 U.S.C. § 5.

Petitioner also argues that significant consequences may flow from the decision below if it means the State's determination of its electors will not comply with the conditions in 3 U.S.C. § 5. Pet. Br. 30-34. Of course they may. But 3 U.S.C. § 5 still

contains no legal prohibition. Thus, while someone, even an official of another branch of state government, might have a complaint about an action that denied the State's electors the protection of Section 5, there would be nothing *unlawful* about it, and therefore no basis for this Court to order vacatur or reversal.

In any event, having conceded that Section 5 is just a safe harbor provision that would give "conclusive" effect to a State's determination of its electors if, as happened during the Hayes-Tilden election, more than one return purporting to contain the electoral votes of that State were to be received by the President of the Senate, petitioner has also necessarily conceded that it would be improper for this Court to rule on whether the procedure by which Florida will determine who its electors are complies with the statute.[9]

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[9] It would plainly be premature for this Court to address compliance with Section 5, because no one in Congress has purported to rely on its provisions in determining whether the votes of electors from Florida shall be counted. Indeed, there has not been submitted "more than one return or paper" purporting to contain the ballots cast by Florida's legitimate electors. 3 U.S.C. § 15. And, even if 3 U.S.C. § 5 were read more broadly than the language of 3 U.S.C. § 15 appears to permit, so that it provided a safe harbor not only in cases where more than one set of votes might be received, but in *any* case in which objection would be made by a Senator and a Representative under 3 U.S.C. § 15 to an electoral vote, no such objection has yet been made to any electoral vote cast by any elector from the State of Florida. Petitioner's complaint about 3 U.S.C. § 5 at present thus involves only "uncertain or contingent future events that may not occur as anticipated, or that may not occur at all." 13A Charles A. Wright, et al. FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2d § 3532 (2d ed. 1995 & Supp. 1998).

Should the State of Florida appoint electors to whom petitioner objects, and should there then be some dispute about who the lawful electors from the State of Florida are, or whether the votes cast for the State of Florida in the electoral college are lawful, 3 U.S.C. § 5 might conceivably be invoked. If it is, and if petitioner believes he will be injured by its invocation, he will then be able to bring his "legal challenge at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 734 (1998). Petitioner urges this Court to "eliminate the potential for a constitutional crisis" by ruling now on his Section 5 allegation. Pet. Br. 35.

3. The Florida Legislature wisely rejects petitioner's view, see Fla. Legis. Br. 1 (arguing that the only effect of 3 U.S.C. § 5 is that "Congress will regard the results of [the state] process as conclusive of which Electors were appointed in the manner directed by the State Legislature"), but propounds an entirely different theory for invalidating the Florida Supreme Court's decision that also contradicts the statutory text and the legislative history. The Legislature's Brief maintains that the failure to satisfy the criteria of Section 5 somehow triggers a state legislature's right to appoint a slate of electors under 3 U.S.C. § 2. Fla. Legis. Br. 2. But Section 2 says no such thing, providing simply that "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State shall direct." It is fallacious to equate a situation where a State "has failed to make a choice" on election day, 3 U.S.C. § 2, with one where the procedures by which it has determined who its electors are is not entitled to the statutory presumption purportedly created by 3 U.S.C. § 5.

Finding no support in the text of Section 2, the Florida Legislature turns to the historical argument that Sections 2 and 5 are linked because they were enacted together "as part of the Electoral Count Act of 1887," relating to the "count[ing of] electoral votes," Fla. Legis.Br.5 – an argument that is simply incorrect: Section 2 was enacted more than *four decades* before Section 5 (1845 versus 1887) as part of a bill entitled "An Act to Establish a Uniform Time for Holding Elections for Electors of President and Vice President in all the States of the Union." Act of Jan. 23, 1845, ch. 1, 5 Stat. 721. The function of Section 2 was simply to address the circumstance in which a winner failed to emerge (as when a required majority of the votes was not secured by any candidate) under an election held pursuant to 3

But, as history reveals, a Court that seeks to avoid some future crisis by abandoning the traditional rules of judicial restraint does so at its – and the nation's – peril.

U.S.C. § 1, which *was* enacted contemporaneously with Section 2. When Congress later enacted Section 5, it did not refer to Section 2 either explicitly or implicitly (compare 3 U.S.C. § 6 (referencing determination made under § 5), § 15 (explicitly cross-referencing § 5)) and, as noted above, the legislative history of Section 5 plainly shows that Congress regarded that statute as doing nothing more than providing a safe harbor from congressional challenge of electors.

Finally, petitioner's reference to the possibility of direct legislative appointment of electors by the Florida Legislature raises a host of constitutional issues. Further, it is not self-evident that such direct appointment is even available. Article II, § 1, cl. 4 empowers Congress to "determine the Time of chusing the Electors." In 3 U.S.C. § 1, Congress has set a uniform national date for this process, which in the year 2000 fell on November 7. There is no doubt that Florida *made* its choice on that date, although by a vote so close and under a counting process so flawed that the State's courts are still attempting to "ascertain[]," 3 U.S.C. § 6, what that choice was. Accordingly, any state legislative attempt simply to appoint electors after the fact would appear to be federally preempted. See U.S. Const. Art. VI.

III. THE FLORIDA SUPREME COURT'S DECISION COMPLIED WITH ART. II, § 1, cl. 2.

1. Petitioner would have this Court read Article II, § 1, cl. 2 as a command to every State that it either exclude both its judiciary and its executive from any role in pronouncing upon the meaning of the statutes through which its legislature "may direct" the appointment of presidential electors, or expressly delegate to them its constitutional duty to perform that task – ignoring the oddity of giving each State only this choice between extremes, and of ruling out the option every State appears to have chosen, in which courts and executives play their accustomed role of construing the legislature's handiwork. Far from promoting state accountability (Pet. Br. 37), petitioner's

approach would hinder the operation of state government and substantially increase federal interference in state affairs.

Indeed, petitioner's reading of Article II would have anomalous results: because Article II, § 1, cl. 2 pertains only to presidential elections, state court interpretive rulings would be invalid (under petitioner's view) only in that context. Yet state election codes are general statutes covering state and local as well as federal elections. Thus, petitioner's argument would lead to the impractical situation where the state election codes mean one thing for presidential elections and something else for all other elections, even when these events occur simultaneously. See Amici Br. of Haynes, *et al.* at 22 n.9. Compare *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), with U.S. Const. Amdt. XXVI.

Certainly, the history of Article II, § 1, cl. 2 lends no support to petitioner's binary version of that provision. That the Framers vested in state legislatures the authority to determine the manner of the appointment of presidential electors says nothing about whether state courts and other branches of state government are excluded altogether from their otherwise applicable state-law role in the lawmaking process. The unbroken history of state court involvement in election law interpretation, gubernatorial vetoes, and attorney general advisory opinions shows that Article II, § 1, cl. 2 does not exclude them from this role.

2. Faced with this reality, petitioner is forced to make two fatal concessions. First, he acknowledges that "[i]n some cases, there might be legitimate questions of state law arising from the implementation of a legislatively authorized scheme of appointing electors," and that in such circumstances state courts are authorized to answer those questions. Pet. Br. 48 n.22. Of course, that is precisely what happened in this case. The Florida Supreme Court engaged in routine, garden variety statutory interpretation. See Part I, *supra*.

Second, petitioner acknowledges that "[t]he Florida legislature *could* have delegated to state courts some authority over the manner [of] appointing electors." Pet. Br. 43; see also Amici Br. of Haynes, *et al.* at 14 n.6 ("To be sure, the Florida legislature can assign a role to the Florida Supreme Court.").

But that is precisely what the Florida Legislature has done. In fact, instead of delegating to the Florida courts the power of directly appointing presidential electors, the Florida Legislature has taken the much more modest – and entirely familiar – step of clearly and explicitly authorizing the Florida Supreme Court to interpret all of Florida law, including the Florida Election Code, and in doing so to reconcile inconsistencies, fill gaps, and perform all the traditional functions of judicial review. This judicial authority is recognized by statute, see Fla. Stat. § 20.02(1) ("The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws."), as well as by the Florida Constitution itself, Art. V, §§ 1, 3, 4, 5.[10] Tellingly, the Legislature has prohibited judicial review of certain election issues – *but not of any issues regarding presidential electors*. For example, the procedure for post-certification contests regarding state legislative elections expressly provides that "the jurisdiction to hear any contest of the election of a member to either house of the Legislature *is vested in the applicable house* * * * ." Fla. Stat. § 102.171 (emphasis added). Significantly, the state legislature has imposed no similar restriction with respect to judicial review of disputes involving presidential electors.[11]

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[10] The Florida Legislature is authorized to propose amendments to the state constitution. Fla. Const. Art. XI, § 1. Article V, the provision governing the judicial branch and its jurisdiction, was proposed by S.J. Res. 53-D in 1971 and subsequently ratified.

[11] The Florida Legislature observes that "Florida has in place an election code for the resolution of disputes and a court system, including a supreme court, with all the usual judicial powers of such courts." Fla. Legis. Br. 9. The Florida Attorney General notes that the Florida election code is a general law, enacted by the legislature "knowing that under Florida's Constitutional and statutory scheme, such general laws are subject to judicial review." Fla. Atty. Gen. Br. 12. Moreover, the Florida Legislature reenacts its entire corpus of statutory law every two years. "The Legislature reenacts this statutory law knowing of the Florida courts' interpretation of it. Such periodic readoption indicates legislative acceptance of those interpretations." *Id.* at 19.

Petitioner maintains that any legislative delegation of authority to courts with respect to elections must be "both clear and explicit." Pet. Br. 43. The delegation here is both, but in any event there is no textual, structural, or precedential support for any such demand. As a Senate report quoted by this Court opines, a legislature's power to delegate its authority under Article II, § 1, cl. 2 is not constitutionally suspect. See *McPherson* v. *Blacker*, 146 U.S. 1, 34-35 (1892) ("it is, no doubt, competent for the legislature to authorize the governor, *or the Supreme Court of the State*, or any other agent of its will, to appoint these electors" (emphasis added)). Where the Constitution restricts the branches to which state legislatures may delegate their federal duties, it achieves that result explicitly.[12]

Moreover, petitioner misapprehends the entire situation presented here: When a state legislature enacts an election code subject to judicial review, it is not *transferring* its Article II duty to select a manner of appointing electors; rather, it is *fulfilling* its duty to select a manner. In the instant case, involvement of the state judiciary is not an abdication of the legislature's power under Article II, § 1, cl. 2; it is an exercise of that power – because the power is itself merely the authority to pick a *process* – not necessarily the authority to determine an *outcome*. Indeed, 3 U.S.C. § 5 indicates on its face that Congress at least recognized the propriety of state judicial involvement as a method for resolving "any controversy or contest" regarding the appointment of presidential electors.

Petitioner claims that *McPherson* stands for the proposition that the state legislature's Article II power "'cannot be taken from them or modified by their State constitutions.'" Pet. Br. 47

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[12] Thus, in the Seventeenth Amendment, the Constitution provides that, in the case of vacancies in the Senate, "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." U.S. Const. Amdt. XVII.

(quoting *McPherson*). Even if that argument were right, it would be irrelevant here, for Florida's Legislature has itself made the Florida Election Code subject to judicial review. But petitioner's description of *McPherson* is incorrect. He fails to inform this Court that the quoted language appears in a section of the opinion describing the history of district appointment of electors, 146 U.S. at 35, and is taken from an 1874 Senate Report. The Court's *own* language in *McPherson* does not support petitioner's claim, which is why petitioner is forced to rely on an unacknowledged quotation from a Senate Report. And the state court cases cited by petitioner hold that state courts invoke state constitutions to constrain state legislatures even in the Article II, § 1, cl. 2 context.[13] In fact, *McPherson* clearly contemplates a state judicial role in adjudicating controversies over the appointment of electors. Petitioner himself cites *McPherson* for the proposition that the method of electoral appointment "raise[s] a 'judicial question,' subject to judicial orders." Pet. Br. at 36 (quoting *McPherson*, 146 U.S. at 24). Indeed, *McPherson* not only endorsed the Michigan Supreme Court's power to decide that Michigan's statutory electoral scheme was valid "under the state constitution and laws," but also remarked that the U.S. Supreme Court is "*not authorized* to revise the conclusions of the state court on *these matters of local law*." *McPherson*, 146 U.S. at 23 (emphasis added). The other cases cited by petitioner similarly contemplate a state judicial role in interpreting election statutes.[14]

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[13] See, *e.g.*, *In re Opinion of the Justices*, 107 A. 705, 706-07 (Me. 1919) ("[T]he state by its legislative direction may establish such a method of choosing its presidential electors * * * ; but the legislative acts both of establishment and of change must always be subject to the provisions of the Constitution of the state in force at the time such acts are passed and can be valid and effective only when enacted in compliance therewith.").

[14] See *State ex rel. Beeson* v. *Marsh*, 34 N.W.2d 279, 282-84 (Neb. 1948); *McLendon* v. *Slater*, 554 P.2d 774, 778-81 (Okla. 1976). The reliance by petitioner's amici Haynes, *et al.*, on *Case of Electoral College*, 8 F. Cas. 427 (C.C.D.S.C. 1876), is highly questionable in light of the holding of *Fitzgerald* v. *Green*, 134 U.S. 377, 379 (1890), that electors for president and vice president are state officers.

The conclusion that the state court played a constitutionally appropriate role is fortified by a special feature of the text of Article II, § 1, cl. 2. Unlike Article V, Article I, § 4 and the pre-Seventeenth Amendment Article I, Article II, § 1, cl. 2 gives the power to pick electors *not* directly to state legislatures, but rather to the "State[s]," using "such Manner" as the "Legislature * * * may direct." The subject of the sentence is the "State," unlike other constitutional clauses which give power and responsibility to state legislatures as such. Even with respect to Article I, § 4, cl. 1, however, this Court has found that the assignment to state legislatures of the federal duty and authority to prescribe the "Manner" of congressional elections does not exclude state governors, courts, and other bodies with state lawmaking responsibilities. See *Growe* v. *Emison*, 507 U.S. 25, 34 (1993); *Smiley* v. *Holm*, 285 U.S. 355, 372 (1932); *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569 (1916).[15]

In sum, once a state legislature has enacted an election code and has entrusted the state courts with the authority to engage in its statutory interpretation, the State has satisfied Article II, § 1, cl. 2.[16]

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[15] *U.S. Term Limits* v. *Thornton*, 514 U.S. 779 (1995) (cited at Pet. Br. 39, 40, 43), in fact supports respondents. In *Term Limits*, this Court noted that the state's "duty" to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives" under Article I, § 4, "parallels the duty under Article II that 'Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.'" *Id.* at 804-05. Hence, *Term Limits* underscores the relevance of *Growe*, *Smiley* and *Hildebrant* in the context of Art. II, § 1, cl. 2.

[16] Any further constitutional constraints on the ability of a state court to decide a particular presidential election case in one way rather than another would have to be located, it would seem, not in Article II, § 1, cl. 2, but in some other source of law – either in a different federal constitutional guarantee, such as the Republican Form of Government Clause, or in state law. If Article II, § 1, cl. 2 did embody some kind of check to ensure that, in extreme cases, a state court did not unilaterally seize the legislature's power – by, for example, itself directly naming the state's presidential electors with

CONCLUSION

The judgment should be affirmed.

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no colorable statutory basis for doing so – the check would surely not resemble the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989), or any of the various formulations proposed by petitioner's amici. See Amici Br. of Haynes, *et al.* at 23 n.10 ("grievously wrong" or "merely erroneous"). Instead, the check would resemble a standard more deferential to state courts. See n.4, *supra*.

Supreme Court, U.S.
FILED
NOV 30 2000
CLERK

No. 00-836

In the Supreme Court of the United States

George W. Bush,

Petitioner,

v.

Palm Beach County Canvassing Board, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF RESPONDENT BUTTERWORTH

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SUMMARY OF THE ARGUMENT

The text of 3 U.S.C. s. 5 does not support invalidation of the Florida Supreme Court's opinion. The purpose of the statute and the remedy plainly provided in the statute are limited. The objective is to confer immunity upon a slate of state electors chosen by laws enacted before the date of their choosing as long as any controversies surrounding selection occur by a fixed date. The effect of failing to comply with the statute is limited only to the loss of that immunity, and to the potential that the slate could be subject to objection before Congress under 3 U.S.C. s. 15. Giving the statute the expansive reading urged by the petitioner will result in an unwarranted intrusion on state sovereignty.

U.S. Const. Article II, section 1, cl. 2, granting states the power to determine the manner for choosing presidential electors, contemplates that such power will be exercised consistent with state constitutional provisions. The Constitution also contemplates state judicial review of the exercise of such state legislative power.

Invalidation of the Florida Supreme Court's opinion is unwarranted, particularly when the state legislature provides for the choosing of presidential electors through general elections laws that apply to all elections. By doing so, the Legislature understood that such laws were subject to state judicial review and to the broad equitable powers of state courts to fashion remedies to protect voters' rights. Further, the Legislature has acquiesced to decades' old judicial interpretations that state elections laws would be liberally interpreted in order to protect voting rights and that elections statutes would be treated as "directory" rather than "mandatory."

The Florida Secretary of State's assertion that she, not the Florida Supreme Court, is the only entity authorized to interpret Florida elections law is wrong.

REASONS FOR AFFIRMING THE DECISION BELOW

> I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it — discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.
>
> Justice Scalia, concurring, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Emphasis in original).

I. THE TEXT OF 3 U.S.C. S. 5 DOES NOT SUPPORT NULLIFICATION OF THE FLORIDA SUPREME COURT'S OPINION.

The text of 3 U.S.C. s. 5 does not support invalidation of the Florida Supreme Court's opinion. The section's purpose is limited, and plainly spells out the consequences for failing to comply with it.

Section 5's plain language makes clear that Congress' purpose in enacting the statute was to confer immunity on a properly certified slate of electors from objections lodged in Congress[1]:

[1] 3 U.S.C. s. 15 sets out the process for resolving controversies concerning and objections to electors. This section must be read with section 3.

§ 5. Determination of controversy as to appointment of electors

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, **shall be conclusive**, and **shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.**

(Emphasis added.)

If a slate is selected within the prescribed time (all contests and controversies, judicial or otherwise having been timely resolved) and under law "enacted" before the date for choosing the electors, it is conclusively deemed to be the slate entitled to cast ballots for the state. In other words, the slate is immune from challenge to its right to cast presidential ballots on behalf of a state.

The point of the statute is to provide a means for addressing situations in which more than one slate of electors, claiming to represent the same state, send ballots to Congress. Even the

petitioner explicitly recognizes this in his discussion of the rationale for section 5:

> As Representative William Craig Cooper of Ohio explained in the congressional debate on this statute (Act of Feb. 3, 1887, ch. 90, s. 2 24 Stat. 373), "these contests, **these disputes between rival electors, between persons claiming to have been appointed electors,** should be settled under a law made prior to the day when such contests are to be decided." 18 Cong.Rec. 47 (Dec. 8. 1886) (remarks of Rep. Cooper). *See also id.* ("these contests should be decided under and by virtue of laws made prior to the exigency under which they arose").

Petitioner's brief p. 18. (Emphasis added.)

This limited congressional intent should not yield the broad consequences the petitioner envisions. Limited objectives, particularly when they are limited as in the statute, have limited consequences. The only statutory remedy for a departure from the section's requirements is the loss of any immunity the slate of electors chosen by a deviating state might have enjoyed from a challenge in Congress under 3 U.S.C. s. 15. The statute contemplates no other result and provides no textual basis for the massive intrusion into state sovereignty and the injury to federalism that the petitioner demands.

The petitioner's argument that the Florida Supreme Court's opinion somehow "frustrates Congress' carefully orchestrated procedures"[2] for resolving controversies among competing electors is contrary to section 5's plain language.

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[2] Petitioner's brief p. 30.

In reality, the petitioner asks the Court to inject itself into the "manner" of choosing electors, a state matter under U.S. Const. Article II, section 1, cl. 2. The law applying to the method and the process of choosing electors is solely and uniquely a *state* matter. U.S. Const. Article II, section 1, cl. 2.; *McPherson v. Blacker*, 146 U.S. 1 (1892).[3] The powers of both Congress and this Court are constitutionally limited to the resolution of finite federal questions. The issue, here, however, a legal dispute over the manner and method for choosing presidential electors, involves questions of state law alone. The petitioner suggests that federal intervention into a dispute concerning the manner and method of choosing the President is warranted under some general power to nullify state laws or judicial opinions that interfere with a state official carrying out a federally mandated duty. Petitioner's brief p. 30-31. But Article II expressly confers plenary power on a state to determine the manner and method of choosing electors, and the Constitution contemplates the failure of a state to choose them and provides a procedure when a state fails to appoint electors: the election goes on without them. U.S. Const., Twelfth Amendment. This may seem harsh, but it is the balance the Founders struck between the desire to delegate to the states the

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[3] The two cases the petitioner cites as authority for federal power to intervene in federal elections are inapplicable. *Burroughs v. U.S.*, 290 U.S. 534 (1934), involved a prosecution under the Federal Corrupt Practices Act. It is not unreasonable, unconstitutional or contrary to principles of federalism for Congress to punish corrupt practices concerning elections of federal officials. That does not involve the manner of electing a president. *Buckley v. Valeo*, 424 U.S. 1 (1976), dealt with the public financing of provisions of the Federal Election Campaign Act. Whether a presidential campaign is publicly funded does not concern the manner or method for choosing a president.

duty to elect the President and the need for finality in the election. In fact, during the first presidential election, the New York legislature deadlocked over elector selection and the state appointed no electors. *McPherson*, 146 U.S. at 30. Because the Constitution provides the remedy for a state's failure to appoint electors, intervention in a state legal dispute over such appointments is not supported by any federal interest.

Because the manner of choosing presidential electors is a state matter, it would be improvident to use section 5 to reach deep into that process to nullify a state elections law decision merely because it affected a presidential contest. Section 5 activates only when qualified electors — or electors claiming to be properly qualified — deliver their votes to Congress to be acted upon under section 15 and the Twelfth Amendment to the Constitution.

Therefore, the plain text of the statute, the Constitution and the fabric of federalism do not support nullification of the Florida Supreme Court's opinion. The only thing this Court can do if it finds that the Florida Supreme Court's opinion deviated from the requirements of section 5 is to declare that any slate certified pursuant to that opinion is not entitled to the immunity under congressional scrutiny that the statute confers.

II. ARTICLE II, SECTION 1 DOES NOT PERMIT THE IMPOSITION OF BURDENS ON VOTING, IMPAIR STATE JUDICIAL REVIEW, SUPERSEDE THE REQUIREMENTS OF THE FLORIDA CONSTITUTION, OR PERMIT LAWFULLY CAST VOTES TO BE IGNORED AND INACCURATE VOTE TABULATIONS TO DETERMINE THE OUTCOME OF AN ELECTION.

The petitioner's argument is premised upon a notion that, pursuant to U.S. Const. Article II, section 1, cl. 2, state legislatures have been delegated the constitutional authority to ignore lawfully cast votes and to eliminate the ability and the right of local election officials to correct inaccurate counts by the imposition of deadlines for the submission of vote tabulations from county canvassing boards. The petitioner's initial brief argues that prior precedents of this Court support the proposition that review and interpretation of elections laws concerning the manner in which electors are appointed by the judiciary of a state constitutes a violation of the *exclusive* jurisdiction of state legislatures over such matters in violation of the Constitution. The petitioner contends that Article II, section 1 permits state legislatures to enact statutes concerning the appointment of electors outside the confines of state constitutional constraints and beyond the jurisdiction of state courts to review. However, the authorities upon which the petitioner relies are inapplicable.

The petitioner's reliance on *McPherson v. Blacker*, 146 U.S. 1 (1892) is particularly misplaced. Perhaps no prior precedent of this Court more plainly establishes the jurisdiction of the judiciary, both at the state and federal levels, to interpret laws concerning a state legislature's directions regarding the manner

of appointing electors. The petitioner argues that *this Court* "has explained" in *McPherson v. Blacker*, 146 U.S. at 35, that, when directing the manner of choosing presidential electors, state legislatures are not bound by their state constitutions. Petitioner's brief p. 47.[4] However, this Court has never "explained" any such thing. The passage in the *McPherson* opinion is from a May 28, 1874 report by Senator Morton, chairman of the senate committee on privileges and elections, recommending an unsuccessful amendment dividing the states into electoral districts. The passage does not contribute to the holding of the case, and there is no indication that this Court approved of it. *Id.*, pp. 34-35.

Contrary to the petitioner's assertions, *this Court* made clear in *McPherson* that it is an appropriate and expected role of the state judiciary to interpret and review even those laws enacted by state legislatures that concern the manner in which electors are appointed. The issue in *McPherson* was whether U.S. Const. Article II, section 1, cl. 2 authorized states to choose electors in district elections rather than statewide. The case came to the court *after* review and determination by the Michigan Supreme Court on the validity of the statute.

In *McPherson*, this Court looked to the constitution of the state of Michigan in analyzing one of the provisions of the

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[4] The petitioner specifically states:

> As this Court has explained, "[t]his power [to determine the manner of appointing electors] is conferred upon the legislatures of the States by the Constitution of the United States, *and cannot be taken from them or modified by their State constitutions. McPherson,* 146 U.S. at 35 (emphasis added [in Petitioner's Brief].)

Petitioner's Initial Brief, p. 47.

statute rejected by *both* the supreme court of Michigan *and* this Court. Had this Court believed that neither the state constitution applied nor the state judiciary had jurisdiction to interpret and review the validity of a statute enacted in pursuit of a state legislature's authority under Article II, section 1, cl. 2, this Court would have so stated in ruling on the challenge to the Michigan supreme court's holding. However, rather than holding that the state court lacked jurisdiction over such matters, this Court *affirmed* the state supreme court's order — including the part of the state elections statute the state court had invalidated. *McPherson v. Blacker*, 146 U.S. at 41, 42.[5]

Likewise, the petitioner's reliance on *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Anderson v. Celebrezzee*, 460 U.S. 780 (1983), is misplaced. Both cases speak to the limits imposed by state constitutional provisions on the exercise of state legislatures' authority to direct the manner of choosing electors. Both cases make clear that the power of states to select electors to choose the President and Vice President cannot be exercised in such a way as to violate express constitutional commands. Both cases hold that, while Article II, section 1 grants extensive powers to states to pass laws regulating the selection of electors, the provision does not give states power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. *Williams v. Rhodes*, 393 U.S. at 28-29; *Anderson v. Celebrezzee*, 460 U.S. at 794-795, 806.

In light of the petitioner's awareness of these precedents of the Court, it is difficult to understand their challenge to the Florida Supreme Court's opinion. Or, more accurately stated, it is difficult to understand Petitioner's Article II, section 1 challenge to the Florida Supreme Court's *jurisdiction* to issue

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[5] "We entirely agree with the supreme court of Michigan . . . and are of the opinion that the date may be rejected, and the act held to remain otherwise complete and valid."

its opinion, which is purportedly the basis for the petition before this Court. These precedents support the Florida judiciary's role in interpreting the election laws of the State of Florida – even laws which implicate the appointment of electors. These precedents acknowledge the application of state constitutions in the analysis of laws directing the manner of appointment of electors. These precedents support the conclusion of the Florida Supreme Court that such statutes cannot impose burdens on the right to vote through the application of statutory deadlines.

As noted in Respondent Butterworth's initial brief, Florida courts generally give a liberal construction to statutes relating to elections, "in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disenfranchisement of legal voters and the intention of the voters should prevail when counting ballots. . . ." *State ex rel. Carpenter v. Barber*, 144 Fla. 159, 198 So. 49, 51 (Fla. 1940). For this reason, despite the inclusion of words like "shall", the courts have traditionally determined statutory restrictions, such as a requirement that the voter place a cross mark *before* the name of the candidate of his choice, is not a "mandatory statute" but is a formal or "directory statute" and does not prevent the counting of the vote of a voter who fails to comply with the statute where the intention of the voter can be ascertained from a study of the ballot and the vote counted. *State ex rel. Carpenter v. Barber*, 198 So. at 50-51 (vote counted, especially where the cross mark is on the right of the name of the candidate rather than on the left).

Florida law has long recognized, in the context of elections, the continuing duty of elections officials to correct inaccurate vote tabulations and the *equitable power* of the Florida courts, through exercise of their state constitutional power, to fashion

remedies in elections cases, such as by use of writs of *quo warranto* and *mandamus*.[6]

Significantly, the Florida Supreme Court held in 1932, in *Wiggins v. State ex rel. Drane,* 106 Fla. 793, 144 So. 62, 64 (Fla. 1932) that:

> The legal predicate for the issuance of a writ of mandamus to have a recount is therefore that there is an unperformed duty mandatory in its character and continuous in nature until performed, which requires election inspectors to make a correct count and proper return of the votes cast, regardless of what may be the result, and that until this duty is performed according to law there is no *legal* result, although some de facto result may be arrived at and declared on the basis of irregular count or improper return.

(Emphasis in original).

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[6] *Schneider v. Lang*, 66 Fla. 492, 63 So. 913 (Fla. 1913); *State ex rel. Knott v. Haskell,* 72 Fla. 176, 72 So. 651 (1916); *State ex rel. Spears v. Baggett*, 77 Fla. 92, 80 So. 743 (Fla. 1919) (Mandamus lies to compel the performance of the ministerial duty to correctly canvass election returns as made.); *State ex rel. Nuccio v. Williams,* 97 Fla. 159, 120 So. 310 (1929) (Mandamus is appropriate remedy in case election ballots were not correctly and accurately counted, tabulated, or returned); *State ex rel. Peacock v. Latham*, 125 Fla. 793, 170 So. 475 (Fla. 1936) (Mandamus held to lie to compel board of county commissioners to reprint ballots and substitute the candidate whom recount and recanvass showed was nominated in primary, ***notwithstanding that the name of such nominee had not been certified and filed with the board within the time required by statute.***).

Here, the petitioner erroneously asserts to this Court that the Florida Supreme Court "changed" the law and altered the outcome of the certified vote tabulation by its exercise of equitable powers in the order before this Court. The petitioner represents that an order "reversing" that order by this Court will *return* the vote to where it stood on November 14, 2000 – nullifying the hundreds of votes counted during the manual recounts conducted since November 14, disenfranchising hundreds of Florida citizens because their votes were counted *after* the statutory deadline. However, no reading of more than a century's worth of Florida law can lead to the result advocated by the petitioner.

Precedents of this Court establish that Article II, section 1 does not give state legislatures the power to impose burdens on the right to vote, including imposition of inflexible statutory deadlines. *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564 (1983) (statute requiring independent candidate for office of President to file statement of candidacy and nominating petition in March in order to appear on general election ballot in November placed unconstitutional burden on voting and associational rights of supporters of independent candidate).[7] Florida precedents and the express mandates of the Florida Constitution establish that, even in the absence of a statutory remedy, mandamus will lie to require election officials,

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[7] "But, as we have emphasized, 'we must reject the notion that Article II, s 1 gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions.'. *Williams v. Rhodes, supra,* 393 U.S., at 29, 89 S.Ct., at 9." *Anderson v. Celebrezze,* 460 U.S. at 1587, f.n. 18.

including the state canvassing board, to count all ballots cast in which the voter's intent can be ascertained.[8]

Because the Florida courts' power to rectify and compel correction of inaccurate vote tabulations is conferred by the Florida Constitution,[9] their power cannot be enlarged or abridged by the Legislature. *State ex rel. Buckwalter v. City of Lakeland*, 112 Fla. 200, 150 So. 508, 512 (Fla. 1933); *State v. Jefferson*, 758 So.2d 661 (Fla. 2000) ("'While constitutional jurisdiction cannot be restricted or taken away, it can be enlarged by the Legislature in all cases where such enlargement does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the Constitution.' [citations omitted]").

For these same reasons, the petitioner's attack on the deadline the Florida Supreme Court set for the filing of recount returns must fail. The Florida Supreme Court, like any state court, exercised its inherent equitable powers to remedy a threat to fundamental constitutional rights. This Court has recognized the ability of state courts to exercise such equitable remedial powers. *See McDaniel v. Barresi*, 402 U.S. 39 (1971) (student assignment plan involving transportation of African-American

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[8] *Ex parte Beattie,* 98 Fla. 785, 124 So. 273, 274 (Fla. 1929) (Statutory method for contesting elections held not exclusive of common-law remedies of *quo warranto* and mandamus.); *Farmer v. Carson*, 110 Fla. 245, 148 So. 557, 559 (Fla. 1933) (Purpose of statute authorizing election contest is not to supersede *quo warranto* proceedings, but to afford simple and speedy remedy).

[9] Art. V, section 3(b)(8), Fla. Const.(jurisdiction of the Supreme Court of Florida); Art. V, section 4(b)(3), Fla. Const. (jurisdiction of the district courts of appeal); Art. V, section 5(b), Fla. Const. (jurisdiction of the circuit courts).

students to achieve greater racial balance in school system was a valid exercise of state authority)

The petitioner's claim that the Florida Constitution does not apply in matters relating to the grant of authority in Article II, section 1 or the exercise of the state Legislature's duties in matters relating to the appointment of electors is fundamentally flawed. In addition to precedents of this Court such as *Smiley v. Holm*, 285 U.S. 355 (1932), the petitioner ignores the fact that the members of the Florida Legislature derive their power and authority from the state constitution in the first place. Each member of the Legislature has taken an oath to support, protect, and defend that constitution in the faithful performance of their duties[10] and each member's authority to act springs from the grant of power from the state constitution.

In sum, the Florida Supreme Court's decision and its remedy were anticipated by the Florida Legislature and were consistent with U.S. Const. Article II, section 1, cl. 2. Nullification of its judgment is unwarranted, and an unreasonable and unnecessary intrusion on state sovereignty.

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[10] *See* Art. II, section 5(b), Fla. Const.

III. THE SECRETARY OF STATE IS NOT THE LAST WORD ON THE INTERPRETATION OF FLORIDA LAW.

The Secretary of State argues that she, not the Florida Supreme Court, is the sole authority on Florida election law, and that because the Florida Supreme Court disagreed with her, its opinion is void.[11] She cites no authority for this proposition, because there is none.

Although Florida administrative agencies have some power to interpret statutes, the courts are the final authority on the meaning of statutes. *Legal Environmental Assistance Foundation Inc. v. Board of County Commissioners of Brevard County*, 642 So. 2d 1081, 1083-1084 (Fla. 1994). While an administrative construction of a statute may be entitled to deference, that deference is not absolute; if the administrative construction is contrary to legislative intent, for instance, it will not survive judicial review. *Id.* For example, Florida courts have disregarded interpretations of elections law by the Division of Elections when they were contrary to law. *Nikolits v. Nicosia*, 682 So. 2d 663, 666 (Fla. 4th DCA 1996). The same general rules apply in the federal system. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446-447 (1987); *Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984); *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, 120 S.Ct. 1291, 1297 (2000).

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[11] The Secretary also disputes the Attorney General's opinion, suggesting that he has no authority to express opinions about elections matters. But the Florida Attorney General is constitutionally endowed with broad powers. He is the chief legal officer of the state, and constitutionally and statutorily authorized to render opinions on any subject. Art. IV, section 4(c), Florida Const.; section 16.01(3), Florida Statutes.

Finally, it is worth noting that the Secretary's position is internally inconsistent. The Secretary published her opinions — the first on the subject — *after* the date of the election, an act she claims is contrary to 3 U.S.C. s. 5.

CONCLUSION

For these reasons, Respondent Butterworth asks the Court to find the Florida Supreme Court's opinion to be consistent with section 3 U.S.C. s. 5 and to affirm the decision against the claim it violates section Article II, section 1, clause 2 of the U.S. Constitution and the substantive due process clause of the Fourteenth Amendment.

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Dated: November 30, 2000

Supreme Court, U.S.
FILED
NOV 30 2000
CLERK

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

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2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1966) 7
1 Dec. 1803, Annals 13:129, *reprinted in* 5 FOUNDERS' CONSTITUTION 1

REPLY BRIEF FOR PETITIONER

The arguments advanced to this Court by respondents depend upon minimizing into insignificance the meaning of Article II, § 1, cl. 2 of the Constitution, 3 U.S.C. § 5, and the effect of the post-election revision of Florida election law by the Florida Supreme Court. If respondents are correct, the constitutional delegation to state legislatures of the power to determine the manner in which presidential electors are appointed, and Congress's effort to provide a means by which a State's selection of electors will be determined in a timely and conclusive manner according to rules and procedures adopted before the election, may easily be circumvented. The predictable consequence will be post-election chaos, turmoil, litigation and uncertainty whenever a state court changes the law for ascertaining the results of an election in the midst of that post-election process. Every close presidential election will be transformed into a litigation circus, the outcome of which will be determined in substantial part by state court changes in election laws "passed for the occasion." 1 Dec. 1803, Annals 13:129 (*reprinted in* 5 FOUNDERS' CONST. at 453).

I. Respondents' Efforts To Recharacterize The Decision Below Cannot Withstand Scrutiny

Respondents' lengthy and tortured efforts to recharacterize the decision below as a modest, hardly noticeable, garden-variety act of ordinary statutory interpretation fail to withstand the mildest scrutiny.[1]

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[1] Respondents contend that the Florida Supreme Court's revision of Florida election law is impervious to any review by this Court. Gore Br. 1; Butterworth Br. 8-9. Where, however, the resolution of a federal question turns on whether a state tribunal adopted a new rule of law to the detriment of the federal petitioner, this Court has not hesitated to examine the decision in light of preexisting state law. *See*

First, the Florida Supreme Court plainly rewrote the election laws in a number of significant respects. *See* Harris Br. 11-20. Its decision was as far removed as it could be from a "garden variety" statutory interpretation. Gore Br. 1. In fact, while the court seasoned its opinion with discussions of canons of statutory construction, even the court acknowledged that it was changing, not construing, the law. Throughout its opinion, the court repeatedly stressed that it would not be bound by "technical statutory requirements" (Pet. App. 36a), but would use its "equitable powers," *id.* at 37a, to be guided by "the will of the people," *id.* at 8a, "to reach the result that reflects the will of the voters," *id.* at 10a, and to ascertain not the meaning of a statute but the "will of the electors," *id.* at 36a. The court plainly understood that its decision changed the meaning of clear statutory provisions in a manner that could affect the outcome of the election (and will, presumably, apply to future elections).

Respondents' efforts to rationalize what the court below actually did are most transparent in their argument that the court was doing nothing other than resolving a purported "conflict between one provision [§ 102.111] saying that counties filing returns after seven days 'shall' be ignored and another [§ 102.112] saying that returns filed past the deadline 'may' be ignored." Gore Br. 14. Petitioner has already demon-

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Pet. Br. 20; *General Motors Corp. v. Romein*, 503 U.S. 181, 187-88 (1992); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958). Indeed, in *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964), this Court exercised independent judgment to determine whether a state supreme court's "construction unexpectedly broaden[ed] a [criminal] statute which on its face had been definite and precise." Such an "unforeseeable state-court construction," the Court held, violated the defendant's due process right to fair notice by retroactively changing the law. *Id.* at 354-355.

strated the fallacy of that contention. Pet. Br. 22-25 & n.6, 45-46; *see also* Harris Br. 16-18 & n.13. Whatever "reconciliation" may be appropriate between the mandatory and permissive non-inclusion of returns submitted after the deadline, no conceivable manipulation of those provisions could have led to the conclusion that the Secretary "shall accept" such returns.

Respondents' assertion that the mandatory statutory deadline of 5 p.m. on the 7th day after the election, which is contained in equally forceful language in both § 102.111 and § 102.112, conflicts with the counties' discretionary power to grant requests for manual recounts (§ 102.166) "because in many cases a full manual recount simply cannot be completed by 5:00 p.m. on the seventh day following the election," is equally indefensible. Gore Br. 14. The Florida legislature was undoubtedly aware of this potential conflict, since it adopted the recount provision at the same time it reiterated the requirement that counties "must" file their returns within seven days of the election. *See* Fla. Laws 1989, ch. 89-338 § 30, ch. 89-348 § 15. Moreover, any perceived conflict is wholly illusory, since the decision to initiate a manual recount is wholly discretionary. *Broward County Canvassing Board v. Hogan*, 607 So. 2d 508, 509 (Fla. App. 1992). If a county board believes it cannot make the legislative time limit for submitting its returns, it need not conduct the recount. And, if a county board chooses to conduct a recount, the legislature has directed that "[t]he county canvassing board *shall appoint as many counting teams* of at least two electors *as is necessary* to manually recount the ballots" (Fla. Stat. § 102.166(7)(a) (emphases added))—presumably to enable the county to meet the deadline. If it fails to complete the recount by the deadline, § 102.112 provides that the Secretary "may . . . ignore[]" untimely returns. *See* Pet. Br. 22 & n.6.

Respondents—like the court below—close their eyes to the fact that the setting of deadlines constitutes a

balancing of numerous factors and is an inherently legislative task. Here, for example, the Florida legislature had to strike a balance between potentially lengthy recount proceedings, an appropriate period for protests, a suitable period for judicially conducted contests with potential appeals, and the need for finality in the context of the deadlines that apply to a presidential election. It balanced those factors and decided on a seven-day window after the election for protests and limited recounts and twenty-eight days or so for any potential contests. To be sure, such deadlines are "inherently arbitrary," but fixed dates "are often essential to accomplish necessary results." *United States v. Boyle*, 469 U.S. 241, 249 (1985). That is particularly true in the context of presidential elections, where federal law fixes precise deadlines for the appointment of electors because the need for finality has significance for the entire nation. *See* 3 U.S.C. §§ 5, 7. The simple truth is that the Florida legislature established clear, unambiguous and sensible statutory deadlines enforceable by the Secretary of State. The Florida Supreme Court revoked those deadlines and essentially terminated the Secretary's statutorily granted authority.

Second, the Florida Supreme Court also decided to create, out of whole cloth, a new deadline for a selective, standardless, changing and unequal manual recount process for this particular election—an "equitable" decree completely untethered to any legislative judgment. *See* Pet. App. 37a. Having determined to abandon the statutory November 14 deadline, the court was forced to devise another date to ensure some semblance of finality. At oral argument in the court below, one of the justices asked, "Are we just going to reach up [for] some inspiration and put it down in paper?" Unofficial Tr. of Oral Arg. 14. Since respondents' counsel could offer no alternative date, the court apparently did reach somewhere for inspiration and settled on 5:00 p.m. on Sunday, November 26. Pet. App. 38a. Respondents make no effort to contend that the deadline devised by the

court below is not a new rule adopted for purposes of this election.

The court's equitable decree divining a new deadline to fulfill its vision of the will of the electorate did not just substitute one arbitrary deadline for another. The court's ruling also had the effect of substantially shortening the legislatively decreed time for post-certification contests to the election results (assuming *arguendo* that such contests are even permissible in this context). Once the results were finally certified on November 26, respondent Gore filed a contest to the election. Under Florida law, the defendant(s) must respond, Fla. Stat. § 102.168(6), and defend the certified outcome in full judicial proceedings, including discovery, trial, and appeals. *See, e.g., Bolden v. Potter*, 452 So. 2d 564, 565-66 (Fla. 1984). In light of the federal deadline for the appointment of electors, the court's extension of the certification deadline has dramatically compressed the time for efforts to contest the election and, most significantly, for defending against such efforts.

The partisan struggle in Florida today is precisely the kind of chaotic situation that would have been avoided by adherence to the statutory deadline. The Florida Supreme Court's willingness to fashion new rules of law for this election has cast the election into turmoil and prolonged a dispute that should have been avoided. The court's revision of Florida election law, which is inconsistent with Article II and incompatible with Florida's implementation of 3 U.S.C. § 5, should be set aside so that the presidential election can achieve lawful finality.

II. The Decision Below Cannot Be Reconciled With Article II

As previously explained (Pet. Br. 36-50), the Florida Supreme Court's equitable reworking of Florida's statutory electoral scheme cannot be reconciled with Article II, § 1, cl. 2 of the Constitution, which provides that

electors shall be appointed "in such Manner as the [state] Legislature . . . may direct." Respondents have failed to justify the post-election judicial revision of the Legislature's direction as to how Florida's electors are to be appointed.[2]

The Gore respondents contend that "Article II's command is directed to the States *qua* States." Gore Br. 34-35. That assertion is incorrect. Article II does vest the authority to *appoint* electors in "Each State." However, the Constitution vests the authority to "direct" the "Manner" of appointing electors in each State in "the Legislature thereof." As petitioner has already established (Pet. Br. 41-43), this distinction is of constitutional significance. Where the Framers intended to vest authority in the States as such, they said so. But where they wanted to specify an organ of state government to perform a function (or carry out a responsibility), they *also* said so. Where the Constitution spells out the agency of the State that is assigned a particular function, fulfillment of the constitutional design requires that such a designation be afforded legal meaning.

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[2] The Gore respondents suggest that "this claim may not be properly before the Court." Gore Br. 33. That suggestion, tentative though it is, is unwarranted. Petitioner argued below that Article II of the Constitution "provides that the *legislatures* of the States will prescribe the manner in which presidential electors are chosen," and that it would "violate federal law for the state *courts* to use equitable doctrines to supplement the *legislature*'s judgment, reflected in the statutes of the state, regarding the methods and time limits for selecting presidential electors." Pet. App. 62a-63a n.15. This was sufficient to put the Florida Supreme Court on notice of precisely the claim presented in this Court: That the court would (and, ultimately, did) exceed its constitutional authority if it were to supplant the legislature's directives regarding the manner of appointing electors with its own. *See, e.g., Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579, 1586 (2000); *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935).

Relying primarily on *Smiley v. Holm*, 285 U.S. 355 (1932), respondents assert that state statutes governing the appointment of electors "have always been subject to state law processes including state judicial review and gubernatorial veto." Gore Br. 36; *see also* Butterworth Br. 14-15. *Smiley* held that a state governor could participate through the veto power in the enactment of electoral legislation; it did not address, nor has this Court *ever* addressed, the authority of a state *court* to revise laws relating to presidential elections enacted under Article II. The distinction is significant, because the Framers anticipated participation by the executive branch (through the veto power) in the legislative process, but specifically *rejected* any involvement of the judiciary in that process. *Compare* U.S. CONST. art. I, § 7, cl. 2, *with* 1 *The Records of the Federal Convention of 1787* 21 (Max Farrand ed., 1966), 2 Farrand 75 (Framers rejected proposal for "council of revision," comprised partly of judges, with power to nullify legislation). As explained earlier, the Framers contemplated various means by which electors might be selected in their lengthy consideration of this subject; the one alternative that was roundly rejected was that the selection be lodged with the state judiciary. Pet. Br. 38.

Smiley actually supports petitioner, not respondents. This Court in *Smiley* made clear that the constitutional delegation to state legislatures to regulate the "manner" of congressional elections (under Art. I, § 4) involves "lawmaking." 285 U.S. at 366. Because, under the state constitution there involved, the governor had a role in the "lawmaking" function (*i.e.*, the veto power), his exercise of that role was constitutional. *Id.* at 368; *see also State ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568-69 (1916) (sustaining use of referendum in respect of congressional election because state constitution allowed "lawmaking" through referendum). In Florida, however, the judiciary does *not* have a role in the "lawmaking" process. FLA. CONST. art. II, § 3; Fla. Stat. § 20.02; *see Burdick v. State*, 594 So. 2d 267, 270 n.8 (Fla. 1992)

("Clearly this Court's role is to interpret, not to legislate. Accordingly, we can do no more than point out what appears to us to be a serious inconsistency between the two statutory . . . schemes"). Thus, the state supreme court's revision of Florida's duly enacted legislation, in contravention of the restrictions imposed on it under the state constitution, is the opposite of the situation presented in *Smiley*.[3]

In short, the problem with respondents' approach to Article II is the applicability of the general principle they discuss to the circumstances of this case. Despite their effort to clothe the decision below in benign coloration, that court materially revised the manner of appointing Florida's electors. This was not the formal and authorized participation in the process considered in *Smiley*, but the usurpation of power, however well intended, by the judiciary from the legislature—the specific branch of state government entrusted by the Constitution to perform this function.[4]

The Gore respondents concede (as, indeed, they must) that "[i]f the state supreme court or Governor decided to pick electors on its own, in disregard of state law, that would violate the Constitution." Gore Br. 37

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[3] Moreover, *Smiley* involved redistricting rather than a direct regulation of elections. The apportionment of legislative districts is committed to the States *qua* States by Article I, Section 2. *See Growe v. Emison*, 507 U.S. 25, 34 (1993). For this reason, the Gore respondents' attempted reliance on *Growe*'s approval of state-court involvement in this area (*see* Gore Br. 38) is also misplaced.

[4] Respondent Butterworth actually insists (Br. 17-18) that the state judiciary wields power over elections, including the adjustment of deadlines, that is "wholly independent" of the legislature. While the exercise of such authority might be permissible under state law in elections for state officers, it is clearly not authorized by Article II in presidential elections. The court below apparently overlooked this point

n.24. But *that* is very close to the reality of what happened in this case. The Florida Supreme Court, by unilaterally altering the statutory deadlines for certifying election returns, authorizing extended manual recounts in selected counties, and changing the circumstances under which recounts can be considered, altered the "manner" of appointing electors. The state supreme court here arrogated to itself a power—the power to "direct" the "manner" in which electors will be selected—reserved by our Constitution exclusively to the legislature. *See McPherson v. Blacker*, 146 U.S. 1, 27 (1892).[5] That unauthorized exercise of constitutionally delegated power cannot escape this Court's scrutiny through the simple expedient of labeling it "judicial review."[6]

Finally, the Gore respondents refute an argument not made by petitioner, asserting that the separation of powers is generally not mandatory on the States. Gore Br. 42. As a general proposition, that is unexceptionable. In this context, however, the Constitution specifically assigns the power to determine the manner of appointing presidential electors to the state legislature, not to the State. The Constitution thus, in this instance, does select a specific agency of state government in which to repose this authority. Moreover, petitioner has not argued that the Florida legislature cannot constitutionally

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[5] Petitioner notes that a citation to *McPherson* in the opening brief (at 47) inadvertently omitted the fact that the Court was quoting, with approval, from an 1874 Senate Report on the subject of the Electoral College.

[6] For this reason, the Gore respondents' lengthy recitations of judicial and administrative interpretations of state election laws (Gore Br. 39-41 & nn.28-30), as well as their observation that state courts can adjudicate violations of election laws (*id.* at 43-44), are completely irrelevant. Petitioner has never contended that state courts, or executive officers, are precluded by Article II from construing laws relating to elections.

grant authority to the judiciary where it has explicitly chosen to do so. *See* Pet. Br. 43. Petitioner's point is that the Florida legislature *has not* done so; and in the absence of an express grant of the authority reserved to the legislature by the Constitution, the state supreme court was constitutionally prohibited from exercising that authority of its own volition.

III. The Judgment Below Should Be Vacated Because It Does Not Comply With 3 U.S.C. § 5

A. The Decision Below Fails To Comply With § 5

Section 5 is much more simple, straightforward and functional than respondents have described. It provides an opportunity for States, if they enact pre-election laws providing for the determination of controversies concerning the appointment of electors, and if they resolve such controversies pursuant to such laws in a timely manner, to ensure that the State's determination "shall be conclusive, and shall govern in the counting of the electoral votes." Florida did enact such laws and was in the midst of ascertaining the results of its election pursuant to those laws when the Florida Supreme Court, exercising its equitable powers, rewrote Florida's laws for determining election controversies, enjoined the state executive from complying with those laws, and changed various deadlines and dispute resolution procedures. That intervention violated Article II and jeopardized the State's (and petitioner's) right to the conclusive effect accorded by § 5. The judgment below is, therefore, a nullity.

Respondents' characterization of petitioner's argument concerning the effect of § 5 and respondents' rendition of § 5's legislative history are wide of the mark. It is true that States are not required to adopt election laws as contemplated by § 5. But if they do not do so, they run the risk of the uncertainty and confusion re-

garding the appointment of their electors that is occurring in Florida today.

Florida *did*, however, adopt laws designed to ensure that the State, its voters, and its electors would receive the due process, finality and conclusiveness that § 5 promises. And Florida was in the process of resolving disputes and certifying its electors in accordance with § 5 when the Florida Supreme Court *sua sponte* issued an injunction to stop that process dead in its tracks ten days after the election and, four days later, rewrote the law that embodied Florida's attempt to comply with and gain the benefits of § 5. If that intervention is sustained, Florida and its voters face a risk that they will not obtain the benefits of § 5. If it is a nullity, as petitioner contends, this Court can restore the order to Florida's election that its legislature endeavored to give it pursuant to Article II and § 5.

There is no dispute that one purpose of § 5 is to ensure that determinations of controversies over electors will govern in the counting of electoral votes. Where respondents err is in asserting that the legislative history reveals "that the statute's *only* purpose and effect is to provide the States with a way to guarantee that a State's electors will not be subject to challenge in Congress at the time the electors' votes are tabulated pursuant to the Twelfth Amendment." Gore Br. 23 (emphasis added). Both the text and the legislative history of § 5 make plain that any state court decision resolving a controversy over the appointment of electors on the basis of a new rule of law that had not been enacted prior to the election does not receive the binding and conclusive effect accorded when § 5 is complied with.

Section 5 expressly provides that determinations by state tribunals regarding disputes over presidential electors will have two consequences if they comply with the requirements of § 5: First, such determinations "shall be conclusive," and second, they "shall govern in the counting of electoral votes." 3 U.S.C. § 5. Respon-

dents' interpretation of § 5 effectively reads the first of these consequences out of the statute. In respondents' view, the *sole* and *exclusive* effect of compliance with § 5 is that the state tribunal's determination "shall govern in the counting of electoral votes"; the separate allowance of "conclusive" effect is wholly superfluous. Respondents' interpretation is thus irreconcilable with "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village Inc.*, 503 U.S. 30, 36 (1992).

By declaring that only those state court determinations complying with § 5 would be "conclusive," Congress made clear that § 5 is not aimed solely at determining which electoral votes "shall govern in the counting." Instead, § 5 also addresses the broader question of the types of state court determinations that will receive "conclusive" effect in the process of certifying electoral votes from a State. In order to avoid any incentive for the type of *post hoc* judicial legislation at issue in this case, Congress decided that a state tribunal's resolution of controversies or contests concerning the appointment of electors would not bind the parties and state officials involved, unless such determinations were made "pursuant to" the law as enacted prior to election day. Only this reading of § 5 gives independent meaning to the two distinct phrases contained in the statute—"shall be conclusive" and "shall govern in the counting."

The error in the Gore respondents' interpretation of § 5 is confirmed by the structural relationship between § 5 and 3 U.S.C. § 15. Section 15 sets forth procedures for Congress to follow in determining whether to count a given set of electors from a State. As previously explained (Pet. Br. 31), in some circumstances § 15 requires Congress to count disputed electoral votes in accordance with the certification of the state executive. *See* 3 U.S.C. § 15 (if the Senate and House disagree over multiple electoral vote returns from a State, "the votes of

the electors whose appointment shall have been certified by the executive of the State, under seal thereof, shall be counted"). If state courts were permitted to fashion new rules of law and apply them retroactively to change the results of a presidential election, and were further permitted to compel state executive branch officials to certify election results in compliance with that act of *post hoc* judicial legislation, such state court decisions could govern in the counting of electoral votes despite Congress's express determination in § 5 that judicial determinations of that nature must *not* be given binding effect. Only petitioner's reading of § 5 avoids this irreconcilable conflict between the provisions of § 5 and § 15 by making clear that judicial decisions in violation of the requirements of § 5 are not "conclusive" and thus do not bind state executive officials in the performance of their legislatively conferred responsibilities.

The Gore respondents also contend (Gore Br. 31-33) that because the state supreme court itself was in existence prior to election day and empowered to settle election controversies, § 5 was satisfied. That contention is would make § 5 a virtual nullity. Section 5 requires that the tribunal's determination be made "pursuant to" the "laws enacted prior to" election day. This statutory requirement refutes any implication that courts can comply with § 5 while invoking their equitable powers to decree new election rules in contravention of plain statutory text. *See* Pet. Br. 26. By overriding the clear legislative directives imposing a November 14 deadline on the submission of county election returns and by crafting a new twelve-day extension through its *equitable* powers, the Florida Supreme Court failed to satisfy § 5.

This post-election departure plainly contravenes the purpose of § 5's requirement that disputes be resolved pursuant to laws enacted prior to the election, not under post-election rules of procedure and dispute resolution crafted with full knowledge of their potential effect on the outcome of a disputed presidential election. The leg-

islative history clearly reveals Congress's concern with ensuring that the rules governing election contests would be enacted prior to the election:

> In my judgment it would be wise if it could be provided that these contests should be decided under and by virtue of laws made prior to the exigency under which they arose, made prior to the existence of the particular contest to be decided. . . . *I think that it would be wise if the contest should be made in the face of existing law rather than that the law should be made in the face of the existing contest.*

18 CONG. REC. 47 (Dec. 8, 1886) (remarks of Rep. Cooper) (emphasis added).[7]

Representative Herbert echoed this same sentiment and presciently explained the danger in invoking new legal rules to resolve a dispute over presidential electors:

> The country never will be satisfied in any political case with a temporary expedient or device under a law passed at the moment, after parties had taken sides on the question. The party losing under such circumstances will naturally believe it has been cheated. The people of this country are law-loving and law-abiding, but they want laws passed before cases arise, and not with reference to any special case that may have arisen.

18 CONG. REC. 75 (Dec. 9, 1886).[8]

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[7] Representative Cooper's comments were made in response to a minority objection to the inclusion of the provision that disputes between contending electors should be settled pursuant to the "laws enacted prior to" election day. 18 CONG. REC. 47. Notably, the Gore respondents' many citations to the legislative history behind 3 U.S.C. § 5 do not involve this crucial aspect of the statute, let alone undermine this clear evidence of Congress's intent.

Nothing in the legislative history cited by the Gore respondents answers this primary point. Congress did not intend state courts to be free to change the rules after a presidential election and then impose those newly fashioned rules on the executive branch officials charged with certifying the election results. That is particularly true where, as here, such a state court decision threatens to nullify the legislature's decision (in the exercise of its exclusive authority under Article II) to claim for the State the benefits of compliance with § 5.

Respondents also err in suggesting (Gore Br. 28-30) that applying § 5 in accordance with its terms would raise serious constitutional questions. Respondents' Article II concerns are wholly misplaced. As discussed elsewhere (Pet. Br. 36-39; Part II, *supra*), Article II vests in the state *legislature*, not the state supreme court, the power to determine the manner of appointing electors. Applying § 5 to prevent state courts from adopting new retroactive rules that were not enacted by the legislature, and which undermine a State's ability to select its electors, hardly conflicts with Article II. To the contrary, § 5 advances the constitutional interests expressed in Article II by ensuring that the *legislature*, rather than state courts or other tribunals, determines the manner of appointing presidential electors.[9]

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[8] Ironically, Representative Herbert compared the people's interest in having disputes resolved under pre-set laws with the proper judicial role of interpreting the law as enacted: "Like the upright judge, when he is compelled to decide what his conscience does not approve, he says: 'This, indeed, is very hard, *but so the law is written.*' And therefore it is that an unjust law, an imperfect law, is better than no law at all. *Let the people know beforehand what the law is and what they are to expect.*" 18 CONG. REC. 75 (emphases added).

[9] An interpretation of § 5 that purported to limit the *legislature*'s authority to enact post-election legislation regarding the appointment of electors might raise constitutional ques-

Respondents' federalism argument is equally without merit, as it rests on an inaccurate caricature of petitioner's arguments. Petitioner nowhere contends that § 5 "preclude[s] judicial involvement in state election disputes." Gore Br. 29-30. Petitioner's point is simply that where, as here, a state supreme court has adopted a new rule and attempted to apply it retroactively to affect the results of a presidential election, the court's decision is not binding on either the Congress or state election officials.

B. This Court Should Vacate The Lower Court's Decision In Order To Vindicate The Federal Mechanism In 3 U.S.C. § 5

Respondents' mistaken reading of § 5 drives their inadequate response to the specific question posed by this Court: What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5? The Gore respondents brush aside that question in a single paragraph. Gore Br. 30-31.

According to the Gore respondents, this Court *cannot* vacate the judgment below, even if the Court concludes that the Florida Supreme Court's decision is inconsistent with the requirements of § 5. As shown above, that argument ignores the substance of § 5; moreover, it ignores the effects that the judgment below has had and may continue to have on state officials attempting to perform their role in presidential elections. *See* Pet. Br. 32-36.

Florida, through its legislature and consistent with Article II, has created a system whereby officers of Florida's executive branch are authorized to act to secure for Florida the advantages of § 5: That "*its* final determination" according to laws enacted before the election—not

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tions under Article II, but no such issue is presented in this case.

the determination of some other entity—shall be "conclusive" and shall "govern in the counting of the electoral votes." Actions by the responsible state officials to perform their duties under § 5 cannot be overthrown by the state court, whether or not its ruling is correct as a matter of state law. *E.g.*, *California v. Superior Court*, 482 U.S. 400 (1987) (state supreme court reversed for attempting to prevent state executive from performing duties under federal statute). That the court below purported to base its decision on state law does not shield it from review (or reversal) by this Court when important federal interests are at stake. *See*, *e.g.*, *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (reversing attempt by state supreme court to enforce state law on grounds that state law would impair substantial federal interest); *see also* Pet. Br. 31-32 & n.10.

Moreover, the Court has made clear that when a state court decision is predicated on an erroneous understanding of federal law, the normal course is to vacate that decision and remand for further consideration in light of a proper understanding of federal law. *Three Affiliated Tribes v. Wold Eng'g, Inc.*, 467 U.S. 138, 152 (1984); *see also United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 632 (1973). Thus, even if the Gore respondents are correct that § 5 merely provides a "safe harbor" where the election laws are not changed after election day, it is plain both that the Florida court was concerned that its actions comport with Title III and that it did not understand that its decision might jeopardize such a "safe harbor." *E.g.*, Pet. App. 32a & n.55. Whether or not there has been a change in law under § 5 is a federal question, and, if the Florida court was incorrect in its understanding of federal law, in light of the impending time constraints, this Court should simply vacate the decision below to rectify that error.

It would defeat § 5's very purpose to hold, as respondents urge, that *only* Congress can enforce the statute. That argument would have the perverse effect of

largely rendering § 5 a nullity in precisely those cases—close, contested elections—in which Congress clearly intended § 5 to have the most force. As the Gore respondents acknowledge, the presidential election of 1876, in which Congress had to resolve the conflicting claims of multiple sets of electors, pushed the Nation toward the brink of a "renewed civil war." Gore Br. 23. In the wake of this grave threat to the country's political stability, "Congress recognized that . . . it was essential to take 'this question out of the political cauldron.'" Gore Br. 23-24 n.14 (quoting 15 CONG. REC. 5079 (June 12, 1884) (statement of Rep. Browne)). Section 5 embodies the congressional mechanism for ensuring that in a close election, state tribunals are authorized to act to determine electors with fairness and finality and with reference to pre-existing rules, so that Congress will only rarely be compelled to exercise its ultimate authority to determine which electors are valid. Yet under the Gore respondents' minimalist interpretation, § 5 would simply return the question of contested electors to "the political cauldron" of Congress, even where a state legislature has complied with the statute to obtain for its constituents the benefits of § 5—as Florida's had done here, before the court below intervened. The statute should not be interpreted to require that self-defeating result.

The court below failed to comply with § 5; this Court should vacate the judgment below in order to preserve the federal statutory system and to provide the certainty and finality for presidential elections that Congress intended.

C. The Decision Below Violates Due Process

As 3 U.S.C. § 5 demonstrates, Congress has decided that in the election context *in particular*, retroactive new rules are fundamentally and unacceptably unfair—reinforcing the Due Process Clause's general concern for fundamental fairness and adequate notice. *See* U.S.

CONST. amend. XIV §§ 1, 5. The Gore respondents argue that the new election procedures announced by the court below are factually distinct from the new vote-counting rule found to be unconstitutional in *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995). Gore Br. 45. But here, as in *Roe*, ballots that would *not* have been counted as lawful votes under the rules in place on election day may have their legal status changed as a result of the new timetable, as a direct consequence of selective, subjective, standardless and shifting methods of manual vote recounting and as a result of the Gore respondents' recent, tactical embrace of "dimpled" ballots. Pet. Br. 33 & n.12. Such post-election changes violate due process. *See* Alabama Br. 13-28.

IV. Petitioner's Claims Are Clearly Justiciable

Amici Florida Senate and House contend that compliance with 3 U.S.C. § 5 is a nonjusticiable political question properly resolved by the Florida legislature or Congress. *Amici* Br. 4. That claim is misplaced. This case presents precisely the sort of "judicial question" this Court decided in *McPherson v. Blacker*, 146 U.S. 1, 23 (1892), and numerous other cases that happen to arise in a political context. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) ("The doctrine . . . is one of 'political questions,' not one of 'political cases.'").

There is no "textually demonstrable constitutional commitment of the issue to a coordinate political department," nor is there "a lack of judicially discoverable and manageable standards for resolving" the issues under either 3 U.S.C. § 5 or Article II, § 1. *Baker v. Carr*, 369 U.S. at 217. To the extent that a determination under either provision tangentially *relates* to a constitutional function that may be performed by Congress or the Florida legislature, such an attenuated connection does not preclude judicial review. *See, e.g., Roudebush v. Hartke*, 405 U.S. 15 (1972); *Powell v. McCormack*,

395 U.S. 486 (1969); *Moore v. Oglivie*, 394 U.S. 814 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968).

Perhaps the most significant result of a ruling for petitioner in this case would be to clarify the governing federal law standards and thereby avoid a potential constitutional crisis. By making clear in this case the unwarranted nature of the Florida Supreme Court's intrusion into the legislatively mandated process for appointing electors, this Court will eliminate the potential for an unseemly conflict between Florida's legislative and judicial branches regarding the appointment of electors.

Moreover, the fact that other governmental entities, such as the Florida legislature and Congress, may review the issue—and may have other means of remedying violations of Article II and § 5—does not render these issues nonjusticiable. In *McPherson*, 146 U.S. at 23, this Court exercised jurisdiction over a challenge to Michigan's statutory scheme for appointing electors, even though (as the Michigan Secretary of State argued) state or federal actors might later have adjudicated the same questions in the exercise of their respective authorities. *See also Foster v. Love*, 522 U.S. 67 (1997) (congressional power to judge elections and qualifications of members did not foreclose Court's review of Louisiana election scheme). Consequently, the fact that the state legislature and the Congress might address issues involved in the appointment of Florida's electors in no way precludes this Court from exercising jurisdiction over the present controversy.

CONCLUSION

The judgment of the Supreme Court of Florida should be vacated.

Respectfully submitted.

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November 30, 2000

DEC 1 2000

No. 00-836

Supreme Court, U.S.
FILED
DEC 1 2000
CLERK

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

Reply Brief of Respondents Katherine Harris, Florida Secretary of State, and Katherine Harris, Laurence C. Roberts, and Bob Crawford, as Members of the Florida Elections Canvassing Commission

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ARGUMENT

I

THE SUPREME COURT OF FLORIDA DID MORE THAN INTERPRET THE LAW; IT CHANGED THE LAW

The threshold issue before this Court is whether the Supreme Court of Florida's decision changed the law on November 21 from what it was on election day, November 7. Arguments raised in support of the decision follow this logic line: (i) a state supreme court is the final arbiter of state law; (ii) the interpretation of state statutes is a matter of state law; (iii) the decision below was an "interpretation" of the Florida Election Code; (iv) an interpretation of the law is not a change in that law; and therefore, (v) there is no conflict with federal law, and no basis for this Court to review the decision of the Supreme Court of Florida. *See, e.g.,* Gore Respondents Br. at 13-21; Attorney General ("A.G.") Br. at 4-10; Palm Beach Br. at 6-10.

The Commission Respondents do not contest, and in fact embrace, the first two of these points. The logical flow dissembles, however, with the use of the word "interpretation" in the third point. All can agree that courts may interpret laws; indeed, that is their job. However, the decision below was not an "interpretation" — it was the creation of new principles of Florida law, drawn from equitable precepts and unfettered by "hypertechnical compliance with statutes." Bush Pet. App. at 36a. While the court's opinion starts with a discussion of statutory construction, it then departs from the statutory scheme "to reach the result that reflects the will of the voters, whatever that might be." Bush Pet. App. at 9a-10a. The court concludes that it had to invoke its "equitable power . . . to fashion a remedy . . ." to further Florida constitutional principles. Bush Pet. App. at 37a. Thus, as is clear from the opinion, the action taken by the Supreme Court of Florida was not an interpretation, but the creation of new Florida law. The third point in the line of logic is thus incorrect, and the fourth and fifth points fall of their own weight.

The position that the court engaged in "ordinary judging," using "garden variety" principles of statutory construction is untenable. Gore Respondents Br. at 13 ("The decision by the Florida Supreme Court was an ordinary exercise in statutory interpretation. . . ."); Palm Beach Br. at 10 ("What the Supreme Court of Florida did was not legislative, it was ordinary judging."). The decision was anything but ordinary. The court did not limit itself to interpreting the Florida Election Code. Rather, guided by the Florida Constitution and equitable principles, and denouncing "hypertechnical compliance" with the statutory requirements, the court went well beyond the text of the statute and created new legal rights, rewrote statutory deadlines, and created new criteria for making administrative determinations on election issues.[1]

For example, the court purported to resolve a conflict between section 102.112 (which provides that election results from the county canvassing board *may be ignored* if not filed by the statutory deadline) and section 102.111 (which states that the Commission *shall ignore* such returns) by holding that the Secretary *must accept* untimely election returns unless doing so *will* preclude a candidate, elector, or taxpayer from contesting the certification of election, or preclude Florida voters from participating fully in the federal electoral process. Bush App. at 37a. Both the virtually absolute duty to accept untimely returns and the "test" for rejecting such returns have

1. The court itself recognized that it was creating new law, *see* Bush App. at 36-37a. ("Because the right to vote is the pre-eminent right in the Declaration of Rights of the Florida Constitution, the circumstances under which the Secretary may exercise her authority to ignore a county's returns filed *after the initial statutory date* are limited.") (emphasis added), and remedies, *see* Bush App. at 37-38a ("[W]e conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here."). The Attorney General has also recognized that the court created a new substantive right. A.G. Br. at 5 ("Technical statutory requirements must not be exalted over the substance of this right.").

no basis in the legislative enactments. They are new judicially created provisions.

There are several other changes in the law that are not in real dispute. *First*, no party disputes that the court below *applied* the law differently in this election than in elections past. *Second*, no party disputes that the seven-day deadline in sections 102.111 and 102.112 has been replaced with a 19-day deadline for the purposes of this Presidential election and an indefinite standard created for future elections. *Third*, no party disputes that the contest period is shorter and the protest period longer than they would have been but for the decision below. The point is not to question the court's prerogative to create new rights under state law; the issue is simply whether that decision changed the law.[2]

Certain respondents raise the puzzling argument that only legislatures can change the law, and judicial decisions construing statutes cannot.[3] *See, e.g.*, Gore Respondents Br. at 18; A.G. Br. at 10-11; Palm Beach Br. at 10-13. This Court, however, has recognized instances in which judicial construction has changed the law. For example, "[i]f judicial construction of

2. Moreover, the legislature vested the Secretary with the authority to maintain uniformity in the application, operation and interpretation of the election law and to issue legal opinions regarding that law. Fla. Stat. §§ 97.012(1), 106.23 (2000). In this case, the Secretary issued an opinion interpreting section 102.166(4) to mean that manual recounts for voter error were not authorized during the protest period. The court below created a new common law right to a manual recount in the protest period for almost any purpose. Though the Gore Respondents contend that the decision of the court below was "governed by state laws that long antedate this election," Gore Respondents Br. at 13, they do not, however, offer any legal support for that contention.

3. Additionally, the Attorney General argues that because the legislature was aware that courts interpret and expand the law when they passed the Election Code, the legislature has somehow consented to any possible modifications the courts may make to the statutes. A.G. Br. at 15-19. Such a delegation of power would violate separation of powers under any test.

a statute is unexpected and indefensible by reference to the law which had been expressed," it constitutes a change in the law. *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964). And, "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-54. Specifically, in the context of election law, the United States Court of Appeals for the Eleventh Circuit recently recognized that a post-election judicial decision can constitute a change in the law. *Roe v. Alabama*, 43 F.3d 574 (CA11 1995) (holding that a post-election judicial decision affecting the requirements for filing absentee ballots constituted a change in the law).[4]

Finally, the contention that this case presents a matter of state law that should not be reviewed by this Court is incorrect and misconstrues the relief sought. Florida courts are, of course, free to create constitutional or common law rights. The question before this Court, however, is whether the law in Florida changed with respect to elections after November 7, not whether the change was correct or proper under state law. This Court does not have to express any opinion on the propriety of the common law and constitutional rights created below to answer this question.[5] Nor will this Court's decision affect the *prospective* application of those rights. The only issue is whether the newly-created state rights can be applied retroactively to this federal election. *Bouie*, 378 U.S. at 362 ("While such a construction is

4. The State of Alabama's Amici Brief discusses the history of this case, Ala. Br. at 4-10, 21-25, and provides poignant examples of how post-election changes in the law have serious and far-reaching ramifications, *id.* at 13-21.

5. Therefore, principles of federalism would not bar the relief sought in this case. Though this Court ordinarily does not review a state court's interpretation of a state statute, this Court and the lower federal courts certainly must review such matters to determine if they comply with federal law. *Cf. Carmell v. Texas*, 529 U.S. 513, n.31 (2000) ("Whether a state law is properly characterized as falling under the Ex Post Facto Clause, however, is a federal question we determine ourselves.").

of course valid for the future, it may not be applied retroactively, [any] more than a legislative enactment may be. . . .").

CONCLUSION

A reading of the decision below demonstrates that the Supreme Court of Florida changed the election law on November 21 in several important respects. If this Court finds that the Supreme Court of Florida's application of the new election law to this Presidential election violated federal law, the Court should modify the decision under review and order that no returns from manual recounts received after the November 14 certification should be permitted to be counted in the total of votes for Presidential Electors. Therefore, the totals certified on November 15 and the overseas ballots received by November 17 would constitute the complete certification for the Presidential Electors for the State of Florida.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF THE FLORIDA SENATE AND HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State in such Manner as the Legislature thereof may direct.

3. What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?

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INTEREST OF THE *AMICI CURIAE*[1]

The Constitution and laws of the United States assign preeminent responsibilities to the State Legislatures in the process of appointing Presidential Electors. As we explain in this brief, the disposition of this case, especially in light of the additional question raised by the Court, will almost certainly have a substantial impact on how the Florida Legislature[2] will carry out those responsibilities in the present most unusual circumstances. Indeed, the Florida Legislature's interest is so great that it would have sought to intervene in the litigation below but for the circumstances that, until 14 days after the election, or November 21, 2000, the Florida Legislature was not lawfully organized and the constitutional offices of Speaker of the House, President of the Senate, and Clerk of the respective chambers were thus vacant. FLA. CONSTITUTION ART. III, § 2, § 3a.

SUMMARY OF ARGUMENT

The Constitution grants plenary authority to the State Legislatures to appoint their Presidential Electors in any manner they direct. 3 U.S.C. § 5 provides that, if a State's electoral process is timely and conforms to pre-existing rules,

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1. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The Florida Legislature has secured the consent of all parties to the filing of a brief as *amicus curiae* and those consents are being lodged with the Clerk of the Court.

2. We will use the term "Florida Legislature" to refer to both the Florida Senate and the Florida House of Representatives.

Congress will regard the results of that process as conclusive of which Electors were appointed in the manner directed by the State Legislature. When the electoral process has failed to make a choice that is timely and conforms to pre-existing rules, then under 3 U.S.C. § 2 the State Legislature must appoint Electors to assure that the State's Electors are counted by Congress when exercising its counting authority. The Legislature itself, and not the courts, is the arbiter of when a failure to make such a choice has occurred.

In view of the constitutional and statutory schema, this Court should rule that the question whether the state electoral process deviated from pre-existing law under 3 U.S.C. § 5 is not justiciable but is instead a political matter to be decided in the first instance by the State Legislature under U.S. CONST. Art. II, § 1, ¶ 2 and 3 U.S.C. § 2, then by Congress when exercising its counting authority under U.S. CONST. Amend. XII and 3 U.S.C. § 15.

If the Court finds that the issue is justiciable, it should rule that whether the state electoral process has conformed to pre-existing rules is a federal question under U.S. CONST. ART. II, § 1, ¶ 2 and 3 U.S.C. § 5, to be resolved ultimately by this Court and not by the highest state court.

If the Court also concludes that the electoral process at issue deviated from pre-existing law, and therefore did not comply with 3 U.S.C. § 5, then it should order the Florida courts to correct those deviations before December 12 in order to assure that Florida's Presidential Electors will be determined by the choice of the voters under those pre-existing rules. If those deviations cannot be corrected by December 12, then it will be necessary for the Florida Legislature to exercise its authority to appoint Electors to assure Florida is represented in the Electoral College.

ARGUMENT

1. The State Legislature Has Plenary Authority To Appoint Electors And, When An Election Fails To Make A Timely Choice Pursuant To Pre-Existing Rules, It Must Exercise That Authority To Assure Its Electors Are Counted By Congress.

The Constitution of the United States grants each State Legislature the plenary power to appoint that State's Presidential Electors. *See* U.S. CONST. ART. II, § 1, ¶ 2 ("each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors."). This clause confers "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). " 'The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states.' " *Id.* at 34 (quoting favorably Senate Rep. No. 395, 1st Sess. 43d Cong. (1874)).

The Constitution places upon Congress the duty to count the votes of the Electors whom the states have appointed. U.S. CONST. Amend. XII. Implicit in this duty is the authority to resolve disputes about whether the Electors have in fact been appointed in the manner directed by the State Legislature. Congress has enacted statutes to regulate its counting of electoral votes. These statutes have been codified in Title III of the United States Code.

Where, as in Florida, the Legislature has chosen to use an election to determine which Electors to appoint, 3 U.S.C. § 5 provides that the results of that election shall be deemed conclusive by Congress when it counts electoral votes, provided controversies regarding that election are resolved

in a manner that is both timely (here before December 12, 2000) and in conformance with rules and procedures adopted prior to the election. Timeliness is crucial because of, among other things, the importance of having a President and allowing preparations for an orderly transition. Even more crucial is the principle embodied in Section 5 that the rules of the election must be set before the election and cannot be changed after it becomes clear who would benefit from such a change. Otherwise the law would encourage post-election manipulations of election law to alter the outcome of a Presidential race.

If a State's election "has failed to make a choice" that is timely and conforms with pre-existing law, then 3 U.S.C. § 2 recognizes that appointment of Electors by the State Legislature is proper. In such a case, state legislative appointment would be necessary to assure the State will have Presidential Electors that will be counted by Congress under Title III. Indeed, the Florida Legislature would have an affirmative constitutional duty to appoint Presidential Electors before December 18 to assure Florida is represented in the Electoral College, because the Constitution dictates that each State "shall" appoint the requisite number of Presidential Electors "in such Manner as the Legislature thereof may direct." U.S. CONST. Art. II, § 1, ¶ 2. Where purported Electors have been chosen by an election process that was not conducted in the manner that the State Legislature had directed, then it becomes necessary for the State Legislature to exercise that appointment authority directly.

2. The Question Whether A State Election Of Presidential Electors Has Failed To Make A Timely Choice That Conforms To Pre-Existing Rules Is A Matter To Be Decided By The Political Branches Rather Than By The Courts.

Although no single provision explicitly addresses which entity is responsible for deciding whether an election failed to make a choice that is timely and in conformance with pre-existing law under 3 U.S.C. § 5, a careful reading of the Constitution and the United States Code dictates the answer: the responsibility falls first to the State Legislature and, if it has not exercised that prerogative, then to Congress.

Article II, Section 1, of the United States Constitution expressly grants each State Legislature the authority to assure that its Electors are chosen in the manner it has directed. This constitutional power is conferred directly on the State Legislature, not on the State as a whole, and cannot be limited by state courts or even by a state constitution:

> "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated."

McPherson, 146 U.S. at 34-35 (favorably quoting 1874 Senate Report, *supra*).

Because of the constitutional nature of a State Legislature's appointment authority, Title III of the United States Code cannot be understood as a limitation on the State Legislature's authority to appoint Presidential Electors. *See* 18 CONG. REC. 47 (1886) (statement of Rep. Dibble). Congress has no power to limit the exercise of a constitutional power granted directly to the State Legislatures. As Charles Pinckney stated:

> Nothing was more clear . . . than that Congress had no right to meddle with [the electoral college] at all; as the whole was entrusted to the State Legislatures, they must make provisions for all questions arising on the occasion.

KURLAND & LERNER, FOUNDER'S CONSTITUTION 553. Instead, Title III merely regulates how Congress will exercise its own constitutional authority to count the electoral votes it receives.

Indeed, even if it were constitutionally permissible for Congress to limit the appointment authority of State Legislatures, there is no reason to think Title III was ever intended to do so. Sections 2 and 5 of Title III were enacted as part of the Electoral Count Act of 1887, Ch. 90, 24 Stat. 373, the very title of which emphasizes that it merely regulates Congress's own authority to "count" electoral votes in cases where it is disputed whether the Electors were appointed in the manner directed by the State Legislature. Likewise, it is plain this Court did not understand Sections 2 and 5 to have limited the appointment power of State

Legislatures, since the *McPherson* opinion in 1892 re-emphasized the plenary nature of that appointment authority five years after the Electoral Count Act was enacted. Being enacted in a period between this 1892 opinion and the 1874 Senate Report quoted above, the Electoral Count Act of 1887 surely reflected the contemporaneous constitutional understanding that State Legislatures had exclusive authority over their appointment power, and did not mean to abrogate it.

Where a State Legislature has directly appointed its Electors because there was no election or it was determined that (for reasons of timeliness or deviation from pre-existing rules) the election failed to make a choice, there can be no legitimate dispute in Congress whether the directly appointed Electors were appointed in the manner directed by the State Legislature and thus should be counted. The direct appointment removes any ambiguity about the exercise of the State Legislature's appointment authority. Thus, 3 U.S.C. § 2 provides that Congress will recognize those direct appointments when Congress exercises its own counting power. Congress has a constitutional obligation to count the votes of any qualified Elector who was indisputably appointed by the State Legislature.

Section 5 of Title III is meant to address the more complicated case where the State Legislature has not directly appointed its Electors but has instead directed that those Electors be chosen in an election conducted according to certain rules. Where the election process is conducted according to those pre-existing rules, then under Section 5 its results are conclusive on Congress when it counts the electoral votes. But Title III recognizes that controversies might arise about whether an election was in fact conducted

according to pre-existing rules, raising questions about the validity of one or more slates of Electors. This would create an ambiguity about whether (or which of) the purported Electors were constitutionally appointed in a manner directed by the State Legislature. To resolve such controversies, Section 15 of Title III provides that it will then be up to Congress to determine whether the votes of the Electors before them have been "regularly given" in compliance with the timeliness and pre-existing rules provisions of 3 U.S.C. § 5. *See* 18 CONG. REC. 30 (1886) (statement of Rep. Caldwell); *id.* at 47 (statement of Rep. Cooper). Section 15 goes on to set out elaborate rules for how the House and Senate will resolve objections that the votes of particular Electors were not "regularly given." In essence, such objections are resolved by the concurrent agreement of the House and Senate, and where they disagree the Electors who will be counted are those who were certified to Congress as the correct Electors by the State Governor. 3 U.S.C. § 15. These elaborate rules would not have been necessary if Congress had envisioned the courts would decide the issue of which Electors' votes were "regularly given."

The Florida Legislature respectfully submits that the Court should rule that questions regarding whether the electoral process has conformed with pre-existing law are not issues for this Court. Such questions should be determined by the State Legislature or, if it fails to act by December 18 when the Electors cast their votes, by Congress when it counts those electoral votes on January 6, 2000. Such a ruling that these are non-justiciable questions to be resolved by the political branches would recognize that the Constitution vests the State Legislatures with the power to appoint Electors, and Congress with the power to count their votes. It also makes the most sense of the United States Code

governing how Congress exercises its counting powers. The alternative would put this Court in the uncomfortable position of seeking to enjoin how Congress exercises its constitutional counting authority and how the State Legislatures exercise their constitutional appointment authority.

The situation is analogous to that under Article V, which requires that amendments to the Constitution be ratified either by conventions or by three-fourths of the State Legislatures. This requires determinations of the equally political (but even more fundamental) question whether each State Legislature has duly ratified, pursuant to Article 5, a proposed amendment to the Constitution. Even without any express constitutional provision empowering Congress to count ratifications by State Legislatures, this Court has ruled that

> the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

Coleman v. Miller, 307 U.S. 433, 450 (1939). Indeed, four concurring Justices stated that "Congress has sole and complete control over the amending process, subject to no judicial review." *Id.* at 459 (Black, J., joined by Roberts, Frankfurter & Douglas, JJ., concurring).

A ruling of non-justiciability would avoid involving this Court in a political dispute best resolved by the political

process.[3] It is neither surprising nor inappropriate that the law should lodge that authority in the State Legislatures and Congress. What is at stake here is after all a political determination of who shall be the next President. The issue to be determined is uniquely political. Nor is it likely to recur. Thus, in this rare circumstance, it is entirely appropriate to have it resolved by the branches of government that are most responsive to the will of the people. "The constitution . . . recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." *McPherson*, 146 U.S. at 27. In any event, whether desirable or not, that is the constitutional scheme. *Id.* at 35 ("The question before us is not one of policy, but of power.")

In short, the Florida Legislature submits that the issue of whether its state electoral process has complied with pre-existing law and the directions of the State Legislature is a non-justiciable issue best resolved by the State Legislature responsible for giving those directions. It may be that Congress in exercising its counting authority under U.S. CONST. Amend. XII or 3 U.S.C. § 15 may make its own determination of this question. In either event, such

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3. That the questions the parties ask this Court to answer are political in nature is a conclusion that accords with several of the criteria set out in *Baker v. Carr*, 369 U.S. 186, 271 (1962). There is indeed a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* Moreover, a decision that would in effect decide the outcome of a Presidential election is "of a kind clearly for nonjudicial discretion." *Id.* Also the Court's intervention may be taken to imply "lack of respect due coordinate branches of government." *Id.* And finally there is indeed the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

determinations should not be reviewable in any court. If this Court rejects that contention, then it must determine for itself whether the state electoral process has complied with the provisions of 3 U.S.C. § 5 and the State Legislature's directions under U.S. CONST. ART. II, § 1, ¶ 2. But, as demonstrated in the next section, the one entity that cannot be allowed to have sole unreviewable authority on this issue is the Supreme Court of Florida.

3. If This Is A Matter Justiciable By The Courts, It Is A Matter of Federal Law To Be Determined Ultimately By This Court.

If this Court rules that the issue is justiciable, then the Supreme Court of Florida cannot have the last word on what is, after all, a question of federal law. 3 U.S.C. § 5 provides an express federal statutory requirement to have elections for Presidential Electors determined by pre-existing state election law. The question whether that federal requirement has been violated by a change in state law, if justiciable at all, is justiciable as a federal question. Likewise, U.S. CONST. ART. II, § 1, ¶ 2 requires that Electors be appointed in conformance with the directions of the State Legislature. The issue of whether that constitutional requirement has been met, if justiciable, clearly presents a question of federal constitutional law.

Section 5 of Title III lays down a federal standard for judging whether there has been such a failure to choose Electors: the appointment of Electors set out in state law "shall be conclusive, and shall govern in the counting of the electoral votes" but only if the State has "provided, by laws enacted *prior* to the day fixed for the appointment of electors, for its final determination of any controversy or contest

concerning the appointment of all or any of the electors . . . by judicial or *other* methods or procedures . . . ." 3 U.S.C. § 5 (emphasis added).

Florida has in place an election code for the resolution of disputes and a court system, including a supreme court, with the usual judicial powers of such courts. This does not mean, however, that therefore whatever conclusion emanates from the Supreme Court of Florida must be taken as correct and final by this Court, the Florida Legislature and the Congress. Such a reading of Section 5 would fail to offer assurance, which it is surely the intent of the Section to provide, *see* 18 CONG. REC. 47 (1886) (statement of Rep. Cooper), that the rules and directions of the State Legislature have not been altered after the election to suit a particular outcome. Even if the section grants only procedural justice, what is in question here is precisely a change of election procedure. Pre-existing law did not provide that the election procedure would be whatever the Supreme Court of Florida decided it would be after the election. Rather, the pre-existing law provided that detailed statutory procedures were to be followed and that some issues were to be resolved by the Secretary of State (one of the "other methods or procedures" recognized under § 5) rather than the courts. The Florida courts cannot be the final arbiter of whether they themselves have changed the methods and procedures directed by the Florida Legislature. *See, e.g., Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) (review in the United States Supreme Court will lie to determine whether a state court has misinterpreted state law to defeat a federal right).

Federal constitutional law is replete with instances in which a matter rests upon a determination of state law provided that the final state interpretation or application of

that law does not depart from previously established state law. The rules of property law, for example, are exclusively the creation of state law, but in enforcing the Fifth Amendment's proscription against taking property without just compensation, the federal courts review whether state law changed from what had previously been state law. *See Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1029 (1992) (property limitations that are "newly . . . decreed" by state courts can be takings if they do not reflect "restrictions that background principles of the State's law of property and nuisance *already place* upon land ownership" (emphasis added)); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (whether interest is the property of the owner of the principal depends on what the state law was prior to the regulation). Such an inquiry into the pre-existing condition of state law is also carried out to determine whether there has been a deprivation of "life, liberty or property, without due process of law." U.S. CONST. Amend. XIV, § 1. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Similarly, the Constitution's *ex post facto* clause, U.S. CONST. Art. I, § 10, would be deprived of meaning if inquiry into whether a State has changed its previous law were foreclosed.

In sum, where federal law requires that a rule of law, including a rule of state law, be previously established or enacted, as does 3 U.S.C. § 5, it is a federal question whether the development of law by the courts, including state courts, constitutes an impermissible departure from such previous law. In this case, it appears that there may have been at least three sorts of departures from pre-existing law such as may deprive the choice of Electors of the conclusivity otherwise accorded to the state electoral process by Section 5.

First, the Supreme Court of Florida, by extending the mandatory statutory seven-day deadline for reporting county results to the statewide commission, delayed certification of the vote count after the election, and significantly shortened the time in which contests regarding the vote as certified might be brought and adjudicated. By compressing that time, the court increased the likelihood that such contests would not be finally adjudicated by the date that a final choice of Electors by an election must be made (here, December 12, 2000) and therefore that the Legislature, under Section 2, would have the power and duty to appoint Electors. That compression and the seriousness of its consequences may constitute an important obstacle and deterrent to the full and fair adjudication of such contests. It also appears dramatically to change the existing law by which the Florida Legislature sought to appoint Electors.

Second, the court below shifted responsibility to make any decisions about deadline waivers and interpretations of the election code to itself and away from the statute and the elected official, the Secretary of State, whom the Florida Legislature vested with the authority to make such decisions. The Supreme Court of Florida in essence re-wrote a statutory provision stating that voting returns "shall" be filed in time to say they "may" be filed in time, re-wrote a provision stating that the Secretary "may" count late returns to provide instead that she "must," re-wrote a seven-day reporting deadline provided by the legislature to a nineteen-day deadline, and re-wrote a statute that said the Secretary of State's opinions "shall be" binding on county officials to say they shall not.[4]

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4. *See* FLA. STAT. §§ 102.111-112 (setting forth the deadlines); FLA. STAT. § 106.23(2) ("The Division of Elections shall provide (Cont'd)

These post-election interpretations of the election laws do not appear to conform to pre-existing law.

Third, it appears that several of the county canvassing boards may have failed to adhere to the rules and standards for whether and how to do manual recounts that they had adopted in previous elections, *i.e.*, rules and standards in force "prior to [this election]," or in fact changed those rules and standards after they had begun counting the ballots in this election. Such departures by county canvassing boards would appear to violate 3 U.S.C. § 5, to deprive the choice made by ballot on election day of conclusivity and to require the Florida Legislature to appoint Electors. Nor does it appear that any such departures merely constituted the application to these circumstances of previously established legal principles — such as the primacy of the will of the people or the importance of determining ballot-by-ballot the intent of the voter. Such principles, invoked by the court below, are of such a high level of generality that they do not constrain at all and certainly do not offer the assurance required by section 5 that the State not change the rules after the election has been held to suit the political circumstances. The fact is that there are many possible tests for judging the intent of the voter, and having chosen certain tests before the election as those best calculated to determine that intent, it would appear that the county canvassing boards cannot change the tests in midstream.

(Cont'd)
advisory opinions when requested . . . . The opinion, until amended or revoked, shall be binding on any person or organization who sought the opinion or with reference to whom the opinion was sought"); FLA. STAT. § 97.012 ("The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws.")

Each of these departures from existing law may mandate a finding that Florida's election process has violated Section 5. If so, unless corrected — by the Florida Legislature or as ordered by this Court — those violations may jeopardize Florida's participation in the Electoral College.

4. The Consequences Of A Decision By This Court That The Florida Electoral Process Has Not Conformed To Pre-Existing Law.

If this Court finds a violation of 3 U.S.C. § 5, then it can order the Florida courts to correct the deviations from pre-existing law. Assuming these deviations are corrected by December 12, then the electoral process will have produced a result that conforms with 3 U.S.C. § 5, and there would be no occasion for state legislative action.

Alternatively, the Court might conclude there was a violation of 3 U.S.C. § 5, but the violation cannot be corrected by December 12. This might be the case, for example, if the Court concludes that any manual recounts must be conducted under the pre-existing standard and there is not enough time to re-do the manual recounts under that standard. In that case, the Florida Legislature would be obliged to appoint Electors under 3 U.S.C. § 2 by December 18.

More complicated is the answer to the negative pregnant: what would be the consequences if this Court does *not* find that the Supreme Court of Florida violated 3 U.S.C. § 5? Of course, if this Court should make such a ruling, the Florida Legislature, like other organs of government, state or national, would be bound to honor that determination. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). But the

precise consequences would depend on the reasons given by the Court for its decision.

If the Court does not make the finding because it concludes that the issue is not justiciable, then the Florida Legislature would itself be required to decide whether the election results comported with pre-existing law, and if the Florida Legislature does not make such a decision by December 18, Congress would be obliged to decide the issue on January 6.

Alternatively, if the Court limits its ruling, as Question 3 suggests, to whether the Supreme Court of Florida has deviated from pre-existing rules, it would remain incumbent upon the Florida Legislature and Congress to decide whether the apparent deviations from prior standards by the county canvassing boards were sufficient to justify legislative appointment of Electors under 3 U.S.C. §§ 2, 5 and 15, and U.S. CONST. Art. II, § 1.

Finally, the Court might determine that departures from pre-existing methods and procedures by the Supreme Court of Florida are not sufficiently egregious to warrant correction by this Court. In that event, we would ask the Court also to rule that the Florida Legislature and Congress need not apply the same deferential standard and would thus not be bound by this determination in deciding whether, under the separate powers assigned to them by the Constitution, to appoint or count Electors.

CONCLUSION

The Court should rule that Questions 1 and 2 are not justiciable because their resolution lies in the hands of the Florida Legislature or, if it does not act, the Congress. If this Court nonetheless reaches those questions and concludes that the election decisions below deviated from pre-existing law, then the Court should order those deviations to be corrected before December 12, in which case the Electors will be determined by the choice of the voters under those pre-existing rules. If those deviations cannot be corrected by December 12, then it will become necessary for the Florida Legislature to exercise its authority to appoint Electors to comply with its constitutional duty to assure Florida is represented in the Electoral College.

Respectfully submitted,

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NOV 28 2000
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Nov 28, 2000 No. 00-836 (18)

In The

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF OF *AMICI CURIAE* THE COMMONWEALTH OF VIRGINIA AND THE STATES OF SOUTH CAROLINA AND NEBRASKA IN SUPPORT OF THE PETITIONER

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INTERESTS OF *AMICI CURIAE*

The Constitution of the United States grants to each State the right to participate – as a State – in electing the President of the United States. Each State holds a number of electoral votes, which will be cast for the candidate favored by its people when the Electoral College meets in December. Each State has a profound interest in ensuring that electors from other States have been chosen according to law. If a slate of electors is seated in violation of the law, their votes will effectively disenfranchise the States whose votes they wrongfully offset.

The unlawful events in Florida that gave rise to this lawsuit are a matter of grave concern to the *Amici*. Although those events have not, so far, altered the slate of electors that will be seated, the matter is not yet concluded. Electors have now been certified; however, new challenges and contests are expected. The disenfranchisement that the *Amici* fear may yet occur. Florida has twenty-five electoral votes. The three *Amici* states – Virginia, South Carolina and Nebraska – collectively have twenty-six. Twenty-five of these votes would be negated wrongfully if the now-certified Florida electors favoring George W. Bush were ousted in favor of a competing slate seated through unlawful means.

This is not, however, an issue confined to the 2000 election, or to States currently in danger of disenfranchisement. Allowing the violations of federal law to go unchecked would invite similar – perhaps competing – misconduct in future elections, possibly disenfranchising other States and surely undermining public confidence in the outcome of the election. In order to preserve their

electoral votes – and the constitutional system of which they form a part – the Commonwealth of Virginia and the States of South Carolina and Nebraska file this brief as *Amici Curiae* in support of the petitioner, George W. Bush.

ARGUMENT

One of the issues before this Court is whether actions by the Florida Supreme Court violate the Due Process Clause and/or 3 U.S.C. § 5. This statute requires a State to resolve controversies relating to the appointment of electors under "laws enacted prior to" Election Day, and fundamental principles of due process allow nothing less. The actions in question include post-election decisions by the Florida Supreme Court that (i) arrogate to themselves the discretion previously vested by law in the Florida Secretary of State with respect to recount deadlines, and (ii) create a later deadline previously unknown in Florida law for local canvassing boards to complete and certify their recount results. The petitioner will show that the Florida court's actions violate applicable federal law. The *Amici* will show that the violation is not harmless, and that the real harm caused is exacerbated by the factual context in which it occurred. The post-election change in Florida law announced by the Supreme Court of that State allows – and was intended to allow – yet another post-election change of law: the counting of "dimpled chads" as votes.

The effect of the Florida Supreme Court's decision was to give three heavily Democratic counties – Broward,

Miami-Dade, and Palm Beach – more time to conduct a manual recount of the ballots cast on November 7. During the recounts in those counties, supporters of the respondent, Albert Gore, Jr., demanded that so-called "dimpled chads" be included in the tally. (In fact, now that the results have been certified, Vice President Gore has filed suit claiming that the failure to count such ballots was unlawful.) *Amici* do not contend that the Constitution or federal law speak directly to the issue of dimpled chads. It is important for the Court to recognize, however, that this issue arose in Florida only because of the state supreme court's decision to extend the deadline for manual recounts. Thus, the violation of 3 U.S.C. § 5 inherent in the court's decision may have prejudiced – and may still prejudice – petitioner Bush because it gave the selected counties the opportunity to explore new ways of counting votes at the behest of his opponent. This is the kind of real-world effect that Congress undoubtedly sought to avoid when it provided, in 3 U.S.C. § 5, that election disputes must be decided according to laws enacted before the election is held.

Background: Punch Card Voting

One of the voting systems often employed in the United States involves the use of punch card ballots. Several Florida counties use the punch card system. Voters are given a card containing a matrix of numbered positions arranged in columns and rows. Each position has been pre-scored to create a small rectangle that is held in place at each of its four corners. This rectangular piece of card stock is known as a "chad." In the voting booth, the voter slides his card into a slot that aligns the

numbered positions with a template bearing the names of the candidates, with a small hole next to each candidate's name. By pressing a stylus through the hole next to the name of a candidate, the voter dislodges the corresponding chad, thereby creating a small hole in the card that will allow light to pass. The ballot is then fed into an electronic counting device that registers a vote for each candidate whose chad has been dislodged. Where the voter has voted for more than one candidate in the same race, the tabulating device will recognize the overvote and count the ballot for neither candidate.

Sometimes, a chad on a punch card ballot is only partially dislodged and remains affixed to the ballot by one, two or three corners. These chads are known as "hanging chads" and are sometimes further differentiated by the number of corners that remain attached: One corner attached – "hanging chad;" two corners attached – "swinging door chad;" and three corners attached – "tri-chad." *What Is a Chad? available at http://www.cnn.com* (last visited Nov. 27, 2000).

What is at issue here are not partially dislodged chads, but chads that are indented or that bulge in some way while remaining attached to the card at all four corners. Such indented – or dimpled[1] – chads may occur when a voter places the stylus in the hole, but decides not to punch through. Dimpled chads may also occur by

[1] According to the nomenclature adopted by the Palm Beach County Canvassing Board, a dimpled chad is "a chad on a voting ballot that is bulging, but not pierced, by a voter's stylus." *What Is a Chad? available at http://www.cnn.com* (last visited Nov. 27, 2000).

rough handling of the ballot or by imprecise manufacturing of the ballot. It can occur if the chad is pressed with a stylus or similar object while the ballot is lying on a hard, flat surface.[2] Given the many ways in which a chad might become dimpled – without the voter intending a vote – the general practice in the United States is not to treat dimpled chads as votes. *See infra* at 10.

There are at least three other reasons why it is inappropriate to treat dimpled chads as votes. First, treating them as votes is likely to wrong two groups of voters: the voters whose ballots have been turned into votes for candidates they did not support, and the voters whose actual votes for the competing candidates have been wrongfully offset.

Second, treating indented chads as votes invites inconsistency. Some voters choose to express their ambivalence by punching out the chads of two or more candidates, thereby canceling out their own vote. If an indentation reflects a voter's intent to punch out a chad, then logically *every* punch card ballot must be reexamined to see whether the vote cast by a *detached* chad has been cancelled out by an *indented* chad found on the same

[2] It is this possibility that has led Respondents to suggest that dimpled chads may be the result of voting in a booth where "the voting machine [has] become[ ] clogged with chads from previous voters." Brief in Opposition of Respondents, at 6, n.2. Notwithstanding this theory, Respondents' brief contains no suggestion that any "clogged machines" were ever reported to poll workers or otherwise discovered in Florida.

ballot and in the same race. There is no indication, however, that recount officials in Florida are taking such a consistent approach to the treatment of indented chads.

Third, every voter has an opportunity to inspect his or her ballot before turning it in to be counted. The law presumes that public officials discharge their responsibilities appropriately. *See, e.g., Gallardo y Seary v. Noble*, 236 U.S. 135 (1915). The law must presume as much about the average citizen exercising his or her responsibilities as a voter. Given the instructions provided to Florida voters, *see infra* at 7, it must be presumed that a citizen who intends to cast a vote for a candidate will not turn in a ballot on which the candidate's chad is merely indented. To treat indented chads as votes turns this presumption upside down by presuming that citizens do not know what they are doing when they come to the polls. Such an anti-democratic presumption ought not to guide our nation's most democratic process.[3]

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[3] Although a few voters may make mistakes, courts have held, for example, that where a "ballot records a 'no-vote' on the tabulating machine for a particular office because of the voter's failure to utilize properly the vote recorded by punching out the 'chad' with the instrument provided, the voter has disenfranchised himself with regard to that office." *Rary v. Guess*, 198 S.E.2d 879, 880 (Ga. Ct. App. 1973). Similarly, the Supreme Court of Indiana upheld a trial court decision to reject a ballot in which the voter "apparently attempted to vote . . . but had not sufficiently punched the card." *Wright v. Indiana*, 428 N.E.2d 1212, 1223 (Ind. 1981).

Florida Law: Before and After the Election

Before November 7, 2000, the three counties where the manual recount has been most at issue – Palm Beach, Miami-Dade and Broward – did not recognize indented chads as votes. Prior adherence to this rule is shown, for example, by the official guidelines administered for a decade by the Palm Beach County Canvassing Board:

> [A] chad that is partially hanging or partially punched may be counted as a vote, since it is possible to punch through the card and still not totally dislodge the chad. *But a chad that is fully attached, bearing only an indentation, should not be counted as a vote*. An indentation may result from a voter placing a stylus in the position, but not punching through. Thus, an indentation is not evidence of intent to cast a valid vote.

Palm Beach County, *Guidelines on Ballots With Chads Not Completely Removed* (adopted Nov. 2, 1990) (emphasis added).

This rule was no secret. The necessity of removing the chad was explained at the polls on election day. Voting instructions provided clear diagrams demonstrating the proper method of punch card voting. The instructions also stated in capitalized and bolded letters:

> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**

App. to Pet. for Cert. at 14a.

In the days immediately following this year's election, the Palm Beach Canvassing Board still followed the established rule on indented chads – the Board did not consider them votes. Then – in the middle of the recount – the Board abandoned the rule. "Nicks, dings and indentations" were then treated – in *some* cases – as votes even though they were "marks that are barely discernable to the human eye." Roberto Suru and George Lardner, Jr., *Gore Gains in Broward, Bush in Palm Beach*, WASHINGTON POST, Nov. 25, 2000, at A1 (quoting Judge Charles W. Burton, head of the Palm Beach Canvassing Board). Standing alone, this change in the rules would be enough to run afoul of due process and 3 U.S.C. § 5. But, to compound the problem, no new written standard was ever adopted for when indentations would be treated as votes. "[B]allot inspectors in Palm Beach County switched standards in the middle of the manual count, a development that produced quite a spectacle." Martin Merzer and Caroline J. Keough, *As Bush Files Suit, Sunday Morning, Recount Shows Gore Gains 36 Votes in Palm Beach County, Bush Loses 3*, MIAMI HERALD, Nov. 13, 2000. Replacing a settled, written rule with this post-election, *ad hoc* approach cannot be squared with the certainty contemplated by both fairness and federal law.

Palm Beach was not alone. Broward County started the recount by not counting indented chads, but began to include them after the recount had progressed about halfway. *See* Don Van Natta, Jr., *Counting the Vote: The Recount*, NEW YORK TIMES, Nov. 20, 2000, at A1. In fact, Broward changed its standards *twice*, once before the Florida Supreme Court decision and, again, after that decision. *See, e.g.*, Mark Silva, *Partisans on Both Sides May*

Not Accept Fla. Supreme Court Decision, MIAMI HERALD, Nov. 20, 2000 ("Broward canvassing board Sunday [Nov. 19] broadened its standards for evaluating ballots. . . . "); Susan Fenechio, *Republicans, Democrats Wrangle Over Broward's Dimples*, MIAMI HERALD, Nov. 24, 2000 ("Canvassing board members said the only rule they were following was the order from the Florida Supreme Court, which on Tuesday [Nov. 21] directed them to determine voter intent on a ballot-by-ballot basis. The court set no guidelines, however.") As in Palm Beach, the indentations considered votes in Broward County were tiny – so tiny as to require one judge to use a magnifying glass to confirm or dispute their presence. *See* John F. Harris, *High Court to Hear Bush Appeal*, WASHINGTON POST, Nov. 25, 2000, at A1 (showing photograph of wide-eyed election judge peering at ballot through magnifying glass).

Miami-Dade County also historically used a "two-corner" standard for counting punch card ballots, but changed the standard to include indented chads during that county's abbreviated hand count. *See* Don Van Natta, Jr., *Counting the Vote: The Ballots; Dimpled Votes Are New Hope for Democrats*, NEW YORK TIMES, Nov. 22, 2000, at A1.

The New Rule Is Contrary to the Weight of Authority

The post-election rule changes in three Florida counties are especially egregious since they place those jurisdictions at odds with the great weight of authority on the handling of punch card ballots. The proper handling of chads was the subject of bipartisan agreement in the U.S. House of Representatives in the 1985 election contest

between Frank McCloskey and Rick McIntyre over a Congressional election in Indiana. While that agreement recognized the need to remove chads in certain circumstances, Congress did not treat chads as votes if they were merely indented:

> It was the Recount Director's recommendation that the auditors be instructed to remove any chad if that chad was hanging by two corners or less. It was the Recount Director's professional opinion that a ballot could be in that condition *only* if the voter unmistakably intended to punch that position. *The Recount Director's recommendation was agreed to by both Majority and Minority.*

Committee on House Administration, U.S. House of Representatives, *Relating to Election of A Representative From The Eighth Congressional District of Indiana*, H.R. Rep. No. 99-58 at 33 (Apr. 29, 1985) (second emphasis added).

In 1989, there was a statewide recount in the Virginia gubernatorial race. Based on official returns, the Democrat, L. Douglas Wilder, appeared to defeat the Republican, J. Marshall Coleman, by a margin of 6,854 out of 1,787,424 votes cast, a margin of less than one half of one percent. Coleman then petitioned for a recount, which Virginia law provides must be conducted under the auspices of a special three-judge court. Va. Code § 24.2-801 (formerly § 24.1-249). It is most instructive that, although the recount procedures were vigorously contested, the counting of indented chads was recognized by all sides as being out of bounds. Instead, invoking the bipartisan precedent of the 1985 McCloskey/McIntyre Congressional contest, Coleman sought to count as votes only

those punch card ballots where two or more corners had been detached. Petitioner's Memorandum Regarding Recount Procedures at 25-26, *Coleman v. Wilder*, Cir. Ct. City of Richmond (No. N 8541-1) (1989). Wilder was unwilling to go even that far, stating:

> A physical recount of the punch card ballots used in this election would be fraught with tabulation errors. The ballots are designed with the specific intent to be read and counted by machine tabulators, and, as a consequence, they are not easily read by the human eye. . . . [T]he counting of votes by such machines is inherently more reliable than a manual count. Displacing the machine generated results with the results of a hand counting of punch cards would be a giant step away from achieving an accurate vote count.

Id. at 25. The recount court resolved the issue by denying any manual recount of punch card ballots, but allowing them to be re-read by re-programmed and re-tested computers. Order Fixing Procedures at 6, 8, *Coleman v. Wilder*, Cir. Ct. City of Richmond (No. N 8541-1) (1989).

A 1994 recount in Ohio also involved the question of how to count "bulging" or "indented" chads. The Ohio Secretary of State resolved that question by deciding that such chads are not to be treated as votes, adopting instead the same bipartisan, "two-corner" rule used in the 1985 Congressional contest. The Secretary of State said:

> I believe that the "two corner" rule provides an objective and equitable standard to determine voter intent and whether a particular vote should be counted. A chad hanging by two or

> less corners indicates that voter's intent to vote in that the voter attempted to push the stylus through the chad and vote for a particular candidate or issue. A chad attached by three or all four corners does not demonstrate the voter's intent to vote. "Bulging" or "indented" chads fall into the later category since the chad is still attached by all four corners.

Letter from Secretary of State Bob Taft to Lorain and Huron County Boards of Elections 6 (Dec. 12, 1994), Secretary Taft then went on to say:

> A bulging or indented chad may result from a voter placing the stylus in the hole opposite the candidate's name and then changing his or her mind. It can also occur if the ballot card is bent or in the handling of the card by the voter or an election official. Therefore it is mere speculation to conclude that a bulging or indented chad indicates voter intent.

Id.

Other States that have dealt with partially dislodged chads have also stopped short of treating dimpled chads as votes. In *Duffy v. Mortenson*, 497 N.W.2d 437 (S.D. 1993), the Supreme Court of South Dakota counted a vote registered by a chad that was not entirely dislodged. The rule used by the court is also consistent with the bipartisan rule followed in the 1985 Congressional contest.

> Two of the four corners of this chad have been broken and one side is separated. The area between the perforations is visibly separated and the chad is indented. Additionally, when this ballot is held up to the light, light clearly

> passes through the separated side of the partially punched chad. Therefore, we presume that this alteration was intended as a vote for Mortenson.

Id. at 440. Such an extensive analysis would have been unnecessary if mere indentation were sufficient to register a vote.

In *Escalante v. City of Hermosa Beach*, 195 Cal. App. 3d 1009 (1987), the California Court of Appeals delivered an opinion that is also at odds with the practice of treating dimpled chads as votes. "When the voter is required to *punch out* the cross that corresponds to his choice and he fails to do so he has failed to mark his ballot as required by law and the vote cannot be counted." *Id.* at 1018-19 (emphasis added) (refusing to count ballots not punched in designated voting squares).

In *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990), the Supreme Court of Illinois adopted a rule more generous than the 1985 Congressional contest, but one that still stopped short of counting indentations as votes. The court said that requiring a chad to be fully punched out, or to hang on the back of a ballot, would set too rigid a standard because "ballots with only *perforations* on the chad could not be regarded as indicating the voter's intent to vote." *Id.* at 614 (emphasis added). Of course, "perforate" means more than "indent"; it means "to make a *hole* through." Webster's Ninth New Collegiate Dictionary 873 (1991) (emphasis added).[4]

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[4] The court's ruling in *Pullen* was the subject of an affidavit filed in the record below and stating that *Pullen* treated dimpled

Apparently at odds with these cases are Massachusetts cases holding that "a vote should be recorded for a candidate if the chad is not removed but an impression was made on or near it." *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996). The precedential value of the *Delahunt* opinion is reduced, however, by several factors not present in the current election. The contest between Delahunt and Johnston was the only one on the ballot and the election was held during a "severe thunderstorm," which indicated that putative voters would not have ventured to the polls motivated by anything less than a strong intent to cast a vote in that race. In light of these circumstances, it was unlikely that a large number of voters would have gone to the polls, partially indented the chad, and then decided not to vote. The court cited "the large number of ballots with discernible impressions" as one of the conditions leading to its decision to count indented chads. *Delahunt*, 671 N.E.2d at 1243. In addition, it was asserted that the ballots had sustained water damage, which rendered their puncture difficult and thus led to undecisive markings. *See* John Mintz, *Most States Don't Count Dimpled Ballots*, WASHINGTON POST,

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chads as votes. Investigation by the Chicago Tribune later revealed that the affidavit was inaccurate. "In fact, in the Illinois case, the dented ballots were not counted at all." Jan Crawford Greenberg and Dan Mihalopoulos, *Bush Turns to Top U.S. Court*, CHICAGO TRIBUNE, Nov. 23, 2000 at 1. When confronted by these facts, the lawyer who signed the affidavit did not contradict the finding, but said that "memories fade" and that he "couldn't remember the details." *Id.*

Nov. 24, 2000, at A1.[5] In any event, Massachusetts' treatment of indented chads is out of step with the rest of the country and cannot absolve the three Florida counties from the unlawfulness of their post-election change in the rules.

Judicial practice among the states is mirrored by legislative practice. Almost universally, state statutes that have addressed the issue of indented chads refuse to treat them as votes. For example, Indiana law expressly says that such ballots do not represent votes: "A chad that has been indented, but not in any way separated from the remainder of the card, *may not be counted* as a vote for a candidate or on a public question." Ind. Code Ann. § 3-12-1-9.5(d) (emphasis added). Michigan law says: "If the electronic voting system requires that the elector cast a vote by punching out a hole in a ballot, the vote shall not be considered valid unless the portion of the ballot designated as a voting position is completely removed or is hanging by 1 or 2 corners or the equivalent." Mich. Comp. Laws § 168.799a.

Some States require election officials to remove chads from ballots when they are "loose" or "partly dislodged" or "hanging by 1 or 2 corners." The purpose of removing chads is to permit the electronic voting equipment to count the vote without interference. By so specifying the circumstances when chads are to be removed, these States imply that chads *not* meeting these criteria – *e.g.* chads

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[5] *But see McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620 (Mass. 1982).

that are merely indented – are *not* to be removed and do *not* indicate votes. For example:

Hawaii: Election official allowed to blow on the punchcard or run fingers along it to find "an incompletely detached chad." Code of Hawaii Rules § 2-53-16(d).

Illinois: "Chad" is defined as "that portion of a ballot card which has been *dislodged or partly dislodged* from the ballot card by a voter when recording a vote" and requiring that such a chad be "removed from ballot cards prior to their processing." Ill. Admin. Code tit. 26, § 207.60 (emphasis added).

Massachusetts: "The inspection team shall also riffle the cards to remove any *loose or hanging* chads." Mass. Regs. Code tit. 950, § 54.07(6)(a) (emphasis added).

Michigan: "When a chad is found *attached to the card by 1 or 2 corners*, the chad shall be removed by the inspector and the ballot card placed with the other ballot cards to be tabulated." Mich. Admin. Code § 168.783(2)(a), emphasis added. Michigan also defines "valid punch" as "a punch of a ballot card such that the chad is completely removed or is *hanging by 1 or 2 corners*." Mich. Admin. Code § 168.771(1)(h) (emphasis added).

Montana: Description of inspection board's duties includes "*hanging* chad – remove chad." Mont. Admin. R. § 44.3.1744(1)(c)(ii) (emphasis added).

Tennessee: Ballot box judge must be "satisfied that all *hanging* chads [cards] are removed" before instructing

voter to place ballot in box. Tenn. Comp. R. & Regs. § 1360-2-7.07(2).

Wyoming: "*Loose chad* still attached to the back of any ballot cards shall be removed." Code of Wyo. Rules 002-040-006 § 17(c)(i) (emphasis added).

While some States have adopted a less rigorous standard, none of the states that have statutorily addressed the issue treat indented chads as votes without something more. For example, a Texas statute provides a specific standard that must be used when determining whether an indentation can be considered evidence of intent. The statute provides, in pertinent part, that a vote on a ballot cannot be counted unless "an indentation on the chad from the stylus or other object is present and indicates *a clearly ascertainable* intent of the voter to vote." Tex. Elec. Code Ann. § 127.130(d)(3) (emphasis added)[6]. By contrast, the counting of dimpled chads in Florida has *no* articulable standard and is reminiscent of Alice-in-Wonderland. "It's not objectively subjective or subjectively objective, but I think it's somewhere in the middle. It's

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[6] Other states' statutes provide some guidance on how to count imperfectly cast punch card ballots, but do not specifically deal with the question of indented chads. Colorado, for example, provides that an improperly marked ballot "shall not be counted . . . if for any reason it is impossible to determine the elector's choice of candidate or vote concerning the ballot issue. A defective or an incomplete mark or punch on any ballot in a proper place shall be counted if no other mark or punch is on the ballot indicating an intention to vote for some other candidate or ballot issue." Colo. Rev. Stat. § 1-7-508(2). The Colorado statutes do not define what constitutes a "defective or incomplete" punch, and the caselaw does not elaborate.

not a whim." Shari Rudavsky, *Board Set To Tackle The Undervotes*, MIAMI HERALD, Nov. 23, 2000, at 5C (quoting Chairman of the Broward County Canvassing Board.) The *Amici* do not contest the right of the Florida legislature to enact a statute – *before* an election – similar to the one adopted by Texas. But, the *Amici* do take issue with (i) the local canvassing boards' post-election rule change on counting indented chads, and (ii) the Florida Supreme Court's post-election abolition of the statutory seven day deadline that allowed and encouraged the free-wheeling counting of indented chads to proceed.

In sum, the great weight of authority condemns the newly minted practice of treating dimpled chads as votes. This practice, while inherently suspect, might nevertheless be lawful if it had been adopted before election day. But, by abandoning the rules in the middle of an election recount, the Florida counties have violated the Due Process Clause of the Fourteenth Amendment as well as 3 U.S.C. § 5. By implicitly sanctioning an abandonment of the rules – and by artificially distorting election deadlines to allow the new, unlawful rules to take effect – the Florida Supreme Court has violated these same principles of federal law. Or, as one commentator recently observed, "A basic understanding of fair play – not to mention respect for the law – presumes that you don't arbitrarily change the rules mid-game, altering deadlines or guessing at voter intent." Kathleen Parker, *Rules Don't Count in Vote Recount*, RICHMOND TIMES DISPATCH, Nov. 22, 2000, at A17.

CONCLUSION

The decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

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NOV 28 2000

(19)

Supreme Court, U.S.
FILED
NOV 28 2000
CLERK

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

vs.

PALM BEACH COUNTY CANVASSING BOARD, et al.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Florida

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* This brief is filed with the consent of the parties. Counsel for the parties have filed blanket letters of consent with the Office of the Clerk.

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STATEMENT OF INTEREST OF AMICI

The Amici, who are identified by name in the Addendum to this Brief, are registered Florida voters who did, in fact, cast their ballots in the November 7, 2000, presidential election. By operation of the United States Constitution and Florida statutes, Amici were entitled to participate in that election and have Florida's electors appointed in the manner directed by the Florida legislature before the election, by which means the Florida legislature has provided for the appointment of its presidential electors. The right of these voters to participate in that electoral process was compromised by the intervening Florida Supreme Court's decision. That decision changed the statutory procedures for the election after the election day and before the results were certified, *i.e.*, in the midst of the election process.[1]

SUMMARY OF ARGUMENT

The Constitution expressly delegates to state legislatures the authority to determine the manner for the appointment of electors. *See* Art. II, § 1, cl. 2. The Florida Legislature provided a detailed statutory mechanism for the appointment of electors only to have its statutes rewritten after the fact by the Florida Supreme Court in the decision below. That decision deprives Petitioner and Amici of their federal rights to have Florida appoint its electors in the manner directed by the Florida Legislature before Amici cast their votes. *See* Art. II, § 1, cl. 2; 3 U.S.C. § 5. This Court has jurisdiction to review the Florida Supreme Court's denial of federal rights specifically claimed by Petitioner. *See* 28 U.S.C. § 1257.

The text and history of Art. II, § 1, cl. 2, as well as subsequent judicial decisions, all make clear that state

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[1] No counsel representing a party in this case authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation and submission of this brief.

legislatures enjoy virtually plenary and exclusive authority over the appointment of electors. As a result, state-court decisions that ignore or override statutory provisions governing the appointment of electors raise issues of constitutional magnitude. Such decisions cannot stand as the final word in light of the Constitution's express direction that state legislatures, not state courts, have the preeminent authority to appoint electors. However, the decision below features precisely the kind of judicial overreaching that Article II forbids. The decision below reverses the import of key statutory terms and rewrites statutory deadlines.

To makes matters worse, the Florida Supreme Court applied this new legislation retroactively in contravention of 3 U.S.C. § 5. Article II grants state legislatures the preeminent role in the appointment of electors, and 3 U.S.C. § 5 imposes a limitation on retroactive lawmaking. The Florida Supreme Court's judicial lawmaking violated both these provisions simultaneously. This Court should vindicate Petitioner's and Amici's rights under Art. II, § 1, cl. 2 and 3 U.S.C. § 5.

ARGUMENT

The Florida Legislature enacted, pursuant to Art. II, § 1, cl. 2, a thorough and straightforward legislative scheme governing the appointment of electors. The Florida Supreme Court did not merely interpret this statutory scheme, it wrote it anew. The Florida Supreme Court set forth its own legislation, disregarding the judgments of the Florida Legislature and substituting its own.

If this statutory scheme that addressed a matter of only local concern, such judicial lawmaking could not justify this Court's intervention. But this case involves a matter of surpassing national importance. Art. II, § 1, cl. 2 prevents this

judicial arrogation and reserves the manner of selecting electors to the legislatures of the several states. As this Court has explained in *Hawke v. Smith*, 253 U.S. 221, 227 (1920), "that was not a term of uncertain meaning when incorporated into the constitution. What it meant when adopted it still means for the purposes of interpretation. A legislature was then the representative body which made the laws of the people."

The Florida Supreme Court is not a "representative body." For this reason, the framers rejected any direct role for the state judiciaries in the appointment of electors. *See infra.* Here, however, the Florida Supreme Court enacted new "legislation" out of thin air. It adopted new deadlines guided not by the popular will, but by nothing more than its "equitable" discretion.

In the end, this post hoc judicial lawmaking solved nothing, but instead lengthened the window for political instability and unrest. This Court should vindicate the wisdom of the Framers and reaffirm the preeminent authority of the Florida Legislature.

I. THIS COURT HAS JURISDICTION TO VINDICATE PETITIONER'S AND AMICI'S FEDERAL RIGHTS TO HAVE FLORIDA'S ELECTORS APPOINTED PURSUANT TO THE RULES ESTABLISHED BY THE FLORIDA LEGISLATURE

This Court clearly possesses jurisdiction over this case because the Florida Supreme Court rejected a "right, privilege, or immunity . . . claimed under the Constitution . . . or statutes of . . . the United States." 28 U.S.C. § 1257. Petitioner argued below that the Florida Supreme Court could not reject the rules and deadlines imposed by the Florida Legislature and substitute its own deadlines without violating,

inter alia, Art. II, § 1, cl. 2, and 3 U.S.C. § 5. The Florida Supreme Court implicitly rejected those arguments and infringed on Petitioner's federal rights.

The Florida Supreme Court likewise denied Amici's rights under Art. II, § 1, cl. 2, and 3 U.S.C. § 5 to have the electors from their State appointed "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2. As explained *infra*, Art. II, § 1, cl. 2, grants both Petitioner and Amici a federal constitutional right to have Florida electors in the electoral college appointed in accordance with the laws enacted by the Florida Legislature. By misinterpreting the relevant Florida statutes, ignoring deadlines clearly imposed by the Florida Legislature, and creating new deadlines out of whole cloth, the decision below deprives Petitioner and Amici of federal rights. 28 U.S.C. § 1257 vests this Court with jurisdiction to correct that denial of federally-protected rights.

It is no answer for Respondent to insist that the Constitution leaves election matters to the States. This Court repeatedly has emphasized that all federal elections, especially presidential elections, implicate important federal interests. *See, e.g., Burroughs v. United States*, 290 U.S. 534, 547 (1934) (acknowledging the "clear" federal interest in "protect[ing] the election of [the] President and Vice President from corruption"); *Ex parte Yarbrough*, 110 U.S. 651, 666, 662 (1884) (noting the federal government's "essential" interest in ensuring "that the votes by which its members of congress and its president are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice").

The more fundamental problem with Respondents' suggestion is that Art. II, § 1, cl. 2, grants authority over the

appointment of electors not to the State as an undifferentiated sovereign, but specifically to "the Legislature thereof."[2] Indeed, the gist of Petitioner's complaint is that the decision below deprived Petitioner of his federal right to have electors appointed as directed by the Florida Legislature, as opposed to the Florida Supreme Court.

Under these circumstances, it makes no sense to suggest that this Court lacks jurisdiction because the Constitution leaves the matter to the States. Art. II, § 1, cl. 2, not only specifies that state legislatures shall adopt the rules for the appointment of electors, but further disqualifies any "Senator or Representative, or person holding an office of trust or profit under the United States" from service as an elector. It seems clear that this Court would have jurisdiction to review a state court decision authorizing a Senator to serve as an elector. The Court possesses the identical jurisdiction to review the Florida Supreme Court's decision authorizing a mechanism and schedule for the appointment of electors at variance from that specified by the Florida Legislature.

As developed *infra*, Petitioner and Amici possess a federal right to have Florida's electors appointed pursuant to the process established by the Florida Legislature. Although federal electors and voters in federal elections are not federal

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[2] Respondents suggest that this Court does not impose separation of powers requirements on the States and generally allows the States to allocate power internally as they see fit. *See* Opp. Cert. at 18 n.5. This observation may hold true in the many instances where the Constitution makes general reference to the States. However, the Court has rejected this principle in the relatively few instances in which the Constitution imposes rights and obligations on specific institutions of state government, such as state legislatures. *See Hawke v. Smith*, *supra* (rejecting Ohio's efforts to transfer the constitutional role of the state legislature in the amendment ratification process to the people in a referendum).

officers, they do perform a federal function. *See, e.g., Ray v. Blair*, 343 U.S. 214, 224 (1952); *Burroughs*, 290 U.S. at 545; *Yarbrough*, 110 U.S. at 662. If state laws allegedly interfere with the right to perform that federal function as permitted under federal law, this Court has jurisdiction to vindicate the federal right. In *Ray*, for example, a potential presidential elector asserted a federal right not to be bound by a state law requirement that electors pledge to support the candidate nominated by the party's national convention. Although the Court ultimately rejected the asserted federal right, it asserted jurisdiction "based on this federal right specifically claimed by respondent." *Ray*, 343 U.S. at 216 (citing 28 U.S.C. § 1257(3)). Here, Petitioner and Amici claim the federal right to have the Florida electors appointed according to the process established by the Legislature. That claimed federal right vests this Court with jurisdiction.

Respondents suggest that this Court lacks jurisdiction to review what is essentially an issue of state law. However, in a variety of contexts, this Court will wade into state-law disputes when necessary to vindicate federal rights. For example, on numerous occasions, this Court has intervened to vindicate a litigant's federal right to have state courts give a prior state or federal-court judgment full faith and credit. *See, e.g., West Side Belt R.R. Co. v. Pittsburgh Constr. Co.*, 219 U.S. 92, 99 (1911); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 641 (1900) (noting that for the Court to have jurisdiction there must be "some alleged denial of a right or immunity secured by [the] Constitution"); *Crescent City Live-Stock Landing & Slaughter-House v. Butchers' Union Slaughter House & Live-Stock Landing Co.*, 120 U.S. 141, 146 (1887); *Dupasseur v. Rochereau*, 88 U.S. 130, 134-35 (1874). In such cases, this Court reviews the asserted deprivation of a

federal right, even though it generally requires the Court to undertake an extensive analysis of the state law of judgments. In *West Side Belt Railroad*, for example, this Court affirmed its jurisdiction to determine whether the Pennsylvania state courts had given a prior federal-court judgment full faith and credit even though the Court acknowledged "that the effect of the [Pennsylvania Legislature's] act of May 23 constitutes 'the real and only issue in the case.'" 219 U.S. at 102 (citation omitted). The Court's observation applies to this case: "When a party asserts that due faith and credit have not been given to [there, a judgment; here, the procedures specified by the Florida Legislature], he asserts a right under the Constitution of the United States, and necessarily this raises a Federal question." *Id.* at 99.

This Court also exercises jurisdiction to ensure that a state-law interpretation of a state tax provision does not deny a federal entity's immunity from state taxation. In *Diamond Nat'l Corp. v. State Bd. of Equalization*, 425 U.S. 268 (1976) (per curiam), this Court held a national bank immune from state and local sales taxes, despite the state supreme court's state-law determination that the incidence of the tax fell on a non-federal party. As the dissent acknowledged, "[s]ince the case involves a federal claim of immunity from state taxation, we are not bound by the California court's determination." *Id.* at 269 (Stevens, J., dissenting).

This Court has not hesitated to intervene when States set the rules for federal elections in a manner that allegedly violated federal law.[3] *See, e.g., Williams v. Rhodes*, 393 U.S.

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[3] Indeed, at least one court has gone so far as to treat laws enacted by state legislatures pursuant to their authority under Art. II, § 1, cl. 2, as federal laws. *See Case of Electoral College*, 8 F. Cas. 427, 432-34 (C.C.D.S.C. 1876) (partially unpaginated). That view of the laws in dispute would

23, 28 (1968) (noting that suggestion that dispute over Ohio's limitations on access to the presidential ballot was non-justiciable "requires very little discussion" because it "has been rejected in cases of this kind numerous times"); *McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892) (rejecting the argument that dispute concerning Michigan's procedure for appointing electors was a non-justiciable political question). In *Williams*, for example, the Court emphasized that although the States enjoyed "extensive power . . . to pass laws regulating the selection of electors," such "powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." 393 U.S. at 29.

In short, there is nothing objectionable or anomalous about this Court reviewing a state-law determination to ensure that the court below did not interpret state law in a manner that infringed on rights, privileges, or immunities claimed under the Constitution or statutes of the United States. 28 U.S.C. § 1257 clearly grants this Court jurisdiction over such cases, and this Court has exercised that jurisdiction in cases raising issues of far less importance to the federal government and federal Constitution.

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remove any doubt as to this Court's authority to engage in plenary review to ensure that the decision below correctly interpreted the provisions adopted by the Florida Legislature to govern the appointment of electors.

II. THE COURT BELOW DEPRIVED PETITIONER AND AMICI OF THEIR FEDERAL RIGHT TO HAVE FLORIDA'S ELECTORS APPOINTED ACCORDING TO THE RULES AND DEADLINES ESTABLISHED BY FLORIDA'S LEGISLATURE

A. The Constitutional Text, History, and Subsequent Judicial Decisions All Give the Florida Legislature, not the Florida Courts, Authority over the Appointment of Electors.

The text of Art. II, § 1, cl. 2, the history of that provision's framing, and subsequent decisions of this Court and other state and federal courts all confirm that each State's Legislature possesses plenary and exclusive authority to determine the manner in which electors are appointed. When a state Legislature enacts laws to govern the appointment of electors, it exercises authority under Art. II, § 1, cl. 2. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995). If a state court fails to respect the Legislature's enactments and rewrites them in the service of its own view of the proper method for appointing electors, the court reverses the allocation of authority expressly provided by Art. II, § 1, cl. 2. Accordingly, state-court judicial legislation concerning the appointment of electors is not merely an unfortunate instance of judicial activism – it violates the federal Constitution.

Art. II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." This provision lodges authority not simply in the States but uniquely in the state legislatures. The Constitution does not leave the States free to decide how to allocate

authority over appointment of electors among their various branches of government. By resolving this question for each State, the Constitution pre-empts any state-law separation of powers questions. Whatever may be the division and balance of power among a State's branches of government on other matters, Art. II, § 1, cl. 2 guarantees that the appointment of electors remains under the control of the state legislature.

The history of the framing of Art. II, § 1, cl. 2 confirms what its text makes clear. Although the Framers disagreed as to the optimal method for selecting electors, they all agreed that the selection of electors was not a proper business for the state courts. The record of the framing and subsequent judicial decisions all confirm that the state legislature enjoys the primary authority over the appointment of electors, and in a dispute between the state legislature and the state courts, the legislature must prevail.

The Framers' express delegation to the state legislatures represented a deliberate and thoughtful accommodation between the views of those who favored direct popular election, those who favored election by the state legislatures, and those who preferred election by Congress. *See McPherson*, 146 U.S. at 28. The delegation also avoided subsidiary disagreements over whether States should apportion electoral votes by district or on a winner-take-all basis. *See id.* As this Court summarized in *McPherson*: "The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." *Id.* While the Framers disagreed about the best method for choosing a President, they were of one mind that lodging such authority in the judiciary "was out of the

question." Madison, July 25, 1787 (*reprinted in* 5 Elliot's Debates on the Federal Constitution 563). Madison acknowledged that "[t]here are objections against every mode that has been, or perhaps can be, proposed," and addressed at length the advantages and disadvantages of various methods such as relying upon Congress, state legislatures, state executives, electors, and the people directly. *Id.* The impropriety of a judicial role, in contrast, was so clear to the Framers that it did not merit serious discussion. "The state judiciaries had not been, and he presumed would not be, proposed as a proper source of appointment." *Id.* at 564.

The early history of the Republic confirmed the preeminent role of the state legislatures in the appointment of electors. Although the electoral college did not function as the Framers envisioned in all its particulars, the state legislatures did exercise plenary authority over the appointment of electors in accord with the original design. From the beginning, "various modes of choosing the electors were pursued," and "[n]o question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt." *McPherson,* 146 U.S. at 29. Indeed, appointment by the legislature itself, with no popular vote at all, was a common practice in the Nation's early history. *See id.* at 29-32; *see also, e.g.,* J. Story, Commentaries on the Constitution § 1466 (1833) (stating that the constitutionality of direct legislative appointment "has been firmly established in practice, ever since the adoption of the constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate

upon it").[4] The Florida Legislature, for example, directly appointed electors without conducting a popular vote as late as 1868. *See McPherson*, 146 U.S. at 33. Despite this diversity of appointment methods, no record appears of any attempt by a state court to impose its own view concerning the manner for the appointment of electors upon the legislature. *See id.* at 35 (noting that "our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action").

McPherson leaves no doubt that the plenary and exclusive power concerning the appointment of electors resides in each State's legislature, and not any other branch of state government. The Court recognized that "the sovereignty of the people is exercised through their representatives in the legislature." *Id.* at 25. As a result, the Court reasoned that the state legislatures logically would possess authority over the appointment of electors even if Art. II, § 1, cl. 2, allocated that power to the States generally without specifying its delegation to the state legislatures. *See id.* However, this reasoning does not render the specific delegation to the state legislatures a nullity. As the Court explained, "the insertion of those words [specifying that such power resides in each legislature], operat[es] as a limitation upon the state in respect

[4] In the 108 years since it was handed down, this Court has never questioned its unanimous opinion in *McPherson*. In *Williams v. Rhodes, supra*, Justice Harlan reviewed the historical record of the adoption of Art. II, § 1, cl. 2, and expressly reaffirmed *McPherson*. *See* 393 U.S. at 42-45 & nn.3-7 (Harlan, J., concurring in the result). Justice Stewart, in dissent, relied upon *McPherson* to assert that each State remains "perfectly free under the Constitution to provide for the selection of its presidential electors by the legislature itself." *Id.* at 49.

of any attempt to circumscribe the legislative power." *Id.*[5] Accordingly, Art. II, § 1, cl. 2 expressly prevents a state court from overriding the state legislature's procedures and deadlines for appointing electors or otherwise "attempt[ing] to circumscribe the legislative power."

Art. II, § 1, cl. 2, is one of a relative handful of constitutional provisions that delegate authority to a specified governmental entity within the state government, as opposed to authorizing or prohibiting action by the States. This Court's interpretation of another of these provisions underscores that States do not remain free to reallocate authority that the Constitution specifically assigns.

The Constitution specifies that to become effective a proposed amendment must be ratified "by the Legislatures of three-fourths of the several states." U.S. Const. Art. V. In *Hawke v. Smith,* this Court unanimously rejected an attempt by a State to reallocate the ratification authority from the legislature to the people through the referendum process. The Court first observed that "Legislatures" "was not a term of uncertain meaning when incorporated into the Constitution," but rather referred to "the representative body which made the laws of the people." 253 U.S. at 227. The Court considered the other places in the Constitution where the term was used "with this evident meaning," and concluded that "[t]here can be no question that the framers of the Constitution clearly

[5] Still more emphatically, the Court quoted a Senate report that declared that the appointment of electors was "placed absolutely and wholly with the legislatures of the several states. . . . This power is conferred upon the legislatures of the states by the constitution of the United States, and cannot be taken from them or modified by their state constitutions any more than can their power to elect senators of the United States." *Id.* at 34-35 (quoting S. Rep. No. 395, 43d Cong., 1st Sess. (1874)).

understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states." *Id.* at 227, 228. While Ohio's constitution required a referendum, the Court explained that the "act of ratification by the state derives its authority from the federal Constitution," *id.* at 230, and States do not have the power to reassign those constitutionally allocated functions. The States must follow the procedure specified by Article V.

The *Hawke* Court's reasoning applies equally here. When Florida's Legislature enacted the statutes that govern the appointment of electors, it was exercising its plenary authority derived from Art. II, § 1, cl. 2's specific command. Under that clause, neither the Florida Supreme Court nor any other instrumentality of the Florida government has any right to determine the manner in which Florida's electors are appointed.[6] Whatever may be the division and balance of power under the constitution or laws of Florida in other contexts, when it comes to Article II makes the Florida Legislature supreme over the Florida courts. By rewriting the Legislature's enactments below in the service of its own view of the proper method for appointing electors, the Florida Supreme Court reversed the allocation of authority expressly provided by Art. II, § 1, cl. 2. As explained *supra,* such state-court judicial legislation concerning the appointment of

[6] To be sure, the Florida legislature can assign a role to the Florida Supreme Court. However, when, as here, the parties dispute whether the Florida Supreme Court has exercised an implicitly delegated statutory interpretation function or arrogated authority that the Florida Legislature never intended to delegate, the Florida Supreme Court cannot have the last word as to whether the Florida Supreme Court acted *ultra vires*. If Petitioner is correct that the Florida Supreme Court exercised an authority never delegated to it, then the decision below represents a deprivation of federal constitutional rights that cannot be left unremedied.

electors does not merely raise issues of state law – that practice violates the federal Constitution.

In striking contrast to the Florida Supreme Court's arrogation of authority to decide the manner in which Florida's electors should be appointed, other States' supreme courts have confirmed the primacy of the state legislature in such disputes. In *State ex rel. Beeson v. Marsh,* 34 N.W.2d 279, 286 (Neb. 1948), for example, the Nebraska Supreme Court found that the petitioners had "failed to follow the procedure directed by the Legislature." The court then dismissed petitioners' argument that the statutory procedure violated the state constitution as "misconceiv[ing] the scope of article II, section 1 . . . and the powers therein granted to the Legislature." *Id.* The court held, consistent with *McPherson*, that the Legislature's plenary power under Article II could not be "circumscribe[d]" and therefore concluded that it was "unnecessary . . . to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature and the state constitutional provision." *Id.* at 287.

The New Hampshire high court likewise has emphasized that the procedures enacted by the legislature in the exercise of its plenary authority are not subject to judicial second-guessing. In response to a question concerning the constitutionality of the legislature's provision for absentee voting, the court pointed out that "[t]he whole discretion as to the manner of the appointment is lodged, in the broadest and most unqualified terms, in the legislature." *In re Opinions of Justices,* 45 N.H. 595, 1864 WL 1585, at *5 (N.H. July 19, 1864). The plenary nature of the legislature's power excluded any role for the court: "We have not found it easy to see what valid legal objections there can be to this exercise of the

unlimited authority given by the Constitution . . . ." *Id. See also In re Opinion of the Justices,* 113 A. 293, 298 (N.H. 1921) (reaffirming the court's 1864 opinion and holding that "[a]s the manner of making the appointment is left to the Legislature of each state, there can be no constitutional objection to the scheme now proposed").[7]

The limited federal case law confirms the limited role of the state judiciary and the plenary authority of the state legislature. The decision in *Case of Electoral College,* 8 F. Cas. 427 (C.C.D.S.C. 1876) (partially unpaginated), an extraordinary habeas corpus case arising out of the disputed presidential election of 1876, demonstrates that a state court's interference in a dispute concerning the appointment of electors clearly abridges the state legislature's preeminent authority under Art. II, § 1, cl. 2. South Carolina law vested state election officials with the authority not only to collect and tabulate votes, but also to decide "all cases under protest and contest that may arise," and to certify their determination of the election to the secretary of state by a certain date. *See id.* at 431. The officials' resolution of such protests and issues as arose evidently displeased some elements within the South Carolina government, because the state supreme court ordered the officials simply to aggregate the local returns and to report the total, without looking beyond the face of the returns or considering any protests or contests. After the officials had certified their determination of the election in accordance with their independent performance of their statutory duties, the

[7] *See also* 10 Annals of Cong. 131-146 (1800) 130 (Sen. Pinckney: "if it is necessary to have guards against improper elections of Electors, and to institute tribunals to inquire into their qualifications, with the State Legislatures, and with them alone, rests the power to institute them, and they must exercise it").

state supreme court ordered them to certify a contrary determination. When the officials refused on the ground that having adjourned *sine die* pursuant to statute, they no longer constituted a canvassing board and had no authority to do as the court ordered, the court held them in contempt and imprisoned them.

The federal court granted the writ of habeas corpus. The federal court first held that the officials' actions were "in pursuance of a law of the United States," *id.* at 434, because the officials' powers and duties under the statutes of South Carolina were "derived directly" from Art. II, § 1, cl. 2, *id.* at 432. The South Carolina legislature, "in obedience to that provision, ha[d] by law directed the manner of appointment of the electors," and "that law ha[d] its authority solely from the constitution of the United States." *Id.* at 433. The corollary of the court's holding that the officials' actions were authorized by Article II was that "the whole matter was beyond the jurisdiction of the supreme court" and the officials "were in no wise subject to the control . . . of the judicial department." *Id.* at 433-34. The state supreme court's attempts to interfere with the officials' performance of their statutory duties therefore were void, and the officials were entitled to release.[8]

Although since the *Case of Electoral College* the federal courts have not directly addressed an effort by a state court to usurp a state legislature's authority under Art. II, § 1, cl. 2, a

[8] While the federal court's opinion is not explicit, the habeas petitioners appear to have certified the electors for Hayes and the state supreme court appears to have ordered them to certify the electors for Tilden. *See* W. Josephson & B. Ross, *Repairing the Electoral College,* 22 J. Legis. 145, 185 (1996). The disputed resolution of protests may have concerned fraud or intimidation directed at pro-Hayes black voters. *See id.* at 185 n.299.

number of subsequent cases have emphasized the primary role of state legislatures in election matters. In other election contexts, even in the absence of a clear textual delegation of authority to state legislatures, this Court has emphasized the primary role of state legislatures in remedying constitutional violations. For example, while this Court has found apportionment disputes justiciable, it also has counseled deference and left questions of remedy to state legislatures. *See, e.g., WMCA, Inc. v. Lomenzo,* 377 U.S. 633, 655 (1964). Several Justices expressed similar concerns in the context of presidential elections in *Williams v. Rhodes. See* 393 U.S. at 40 (Douglas, J., concurring) ("The relief asked is of such a character that we properly decline to allow the federal courts to play a disruptive role in this 1968 state election."); *id.* at 48 (Harlan, J., concurring in the result) ("Since Ohio's requirement is so clearly disproportionate to the magnitude of the risk that it may properly act to prevent, I need not reach the question of the size of the signature barrier a State may legitimately raise against third parties on this ground. This should be left to the Ohio Legislature in the first instance.").

B. The Decision Below Violated Article II, Section 1, Clause 2 By Usurping the Florida Legislature's Authority.

Pursuant to its authority and responsibility under Art. II, § 1, cl. 2, the Florida Legislature has enacted a comprehensive statutory scheme governing the manner in which Florida's electors shall be appointed. As detailed above, Art. II, § 1, cl. 2, obligated the Florida Supreme Court to respect the Legislature's exercise of its plenary power. In the decision below, however, the Florida Supreme Court disregarded that obligation and created entirely new rules of law to govern the appointment of Florida's electors. The court below identified

a statutory conflict where none existed, purported to resolve that illusory conflict by imposing a rule directly contrary to the rule mandated by the statute, ignored clear statutory deadlines, and created new deadlines out of whole cloth. This exercise of court-claimed "equitable" power is incompatible with the Florida Legislature's plenary authority and Art. II, § 1, cl. 2 of the Constitution. The decision below does not reflect a customary exercise in statutory interpretation. To the contrary, the court below rewrote the relevant statutes in a manner that clearly usurped the Florida Legislature's authority under Art. II, § 1, cl. 2.

The plain terms of Fla. Stat. § 102.111 expressed the clear will of the Florida Legislature and should have resolved this dispute. That provision directs the Elections Canvassing Commission, the body that the Legislature charged with "certify[ing] the returns of the election and determin[ing] and declar[ing] who has been elected for each office," to reject late returns and to certify the election based on timely returns. *Id.* It provides that if any counties' returns "are not received by the Department of State by 5 p.m. of the seventh day following an election, *all missing counties shall be ignored*, and the results shown by the returns on file shall be certified." *Id.* (emphasis added). The Secretary of State did no more than obey this statutory command when she sought to certify the election based on the results submitted to the Commission by 5 p.m. on November 14, 2000.

The court below, of course, overrode this statutory deadline and imposed its own deadline of November 26, a date of its own invention. In so doing, the court below relied on its belief that "the mandatory language in section 102.111 conflicts with the permissive language in 102.112." Pet. App. at 17a. In reality, no such "conflict" exists. Section 102.112,

the provision appearing immediately after § 102.111's directive to the state Commission, is addressed to the various counties' canvassing boards. Whereas § 102.111 specifies the duties of the Commission, § 102.112 spells out the duties of the county canvassing boards. In perfect harmony with § 102.111, § 102.112 provides that county canvassing boards "must . . . file[ ]" returns with the Secretary of State "by 5 p.m. on the 7th day following the . . . general election." After specifying the county boards' duty and deadline, § 102.112 puts the boards on notice of the consequences that may ensue if the boards fail to comply. Section 102.112 informs the boards that if they fail to file their returns by the statutory deadline, they will incur personal fines and any late-filed returns "*may* be ignored" by the Commission. *Id.* (emphasis added).

These provisions are directed to different entities and perform different functions. Accordingly, there is no conflict. The one provision imposes a mandatory duty on the statewide Commission. The other imposes a duty on county boards and warns them of the consequences of their failure to comply with that duty. Both provisions mandate the identical deadline. The fact that the latter warning is less categorical than it could be, does not deprive the specific direction to the statewide Commission of its mandatory character. For these reasons, a proper interpretation of Florida law would have rejected the asserted conflict as illusory and interpreted § 102.111's mandatory direction to the statewide Commission to mean what it says.

This would be the correct answer as a matter of statutory interpretation even if the federal Constitution did not supply an independent reason for state courts to abide by the state legislature's will, and even if principles of constitutional

avoidance did not favor a construction that avoided a potentially difficult constitutional question. In reality, however, Art. II, § 1, cl. 2, requires state courts to honor the expressed legislative will concerning the process of the appointment of electors, and principles of constitutional avoidance counsel in favor of accepting a construction that conforms as closely as possible to the expressed legislative will. Under these circumstances, the misconstruction of the Florida statutes by the court below cannot stand.

Of course, even if (contrary to fact) there were a "conflict" between § 102.111's mandatory provision and § 102.112's permissive provision, no justification can be imagined for the court's "solution." The court resolved a purported conflict between directives that the Commission "shall ignore" late-filed results and that the Commission "may ignore" late-filed results, by holding that the Commission "shall *not* ignore" late-filed results. Whether or not the Commission always is *required* to ignore late-filed results, the court's holding that the Commission is *forbidden* to ignore late-filed results blatantly rewrites the Legislature's handiwork.

The court further belied its professions of "reluctance to rewrite the Florida Election Code," Pet. App. at 37a, by arrogating the authority to impose a new deadline to replace the deadline specified by the Legislature and obliterated by the court's own "interpretive" exercise. Based on its "equitable" conception of reasonableness, *see id.*, the court unveiled its own scheme to determine the appointment of Florida's electors. Paying no heed to the Legislature's pre-election exercise of its plenary power under Article II, the court conducted its own weighing of the interests in finality and accuracy embodied in the Legislature's express deadline mandate. The court extended the Legislature's November 14th

deadline to November 26th to allow what the court considered to be "a fair and expeditious resolution of the questions presented" in the present dispute over the appointment of Florida's electors. Pet. App. at 38a. That was an exercise of judicial legislation, not statutory interpretation.

Of course, even a blatant exercise of judicial lawmaking by a state court under the guise of the interpretation of a state statute would not justify this Court's intervention, absent a violation of a federal right. But as explained above, Art. II, § 1, cl. 2's delegation of preeminent authority over the appointment of federal electors to the state legislature converts an otherwise merely regrettable exercise in judicial lawmaking into a constitutional violation. In the context of a federal election for the appointment of electors,[9] this Court possesses jurisdiction to correct the Florida Supreme Court's misinterpretation and to vindicate Petitioner's and Amici's rights to have electors appointed pursuant to the laws enacted by the Florida Legislature. This Court should reject the interpretation of the Court below and construe § 102.111's mandatory provision to mean what it says. That interpretation avoids a constitutional violation and vindieates rights claimed

[9] By vindicating the federal constitutional right to have the appointment of presidential electors determined as directed by the state legislature, this Court would not necessarily disturb the Florida Supreme Court's misinterpretation of § 102.111 when it comes to state elections. This Court possesses jurisdiction only to vindicate federal constitutional rights, which in the unique context of Art. II, § 1, cl. 2, requires state courts to interpret state law concerning the appointment of electors correctly. This Court enjoys no general jurisdiction to correct misinterpretations of state law solely for the sake of error correction.

under the federal Constitution.[10]

III. SECTION FIVE OF TITLE THREE PREVENTS THE FLORIDA SUPREME COURT FROM REWRITING THE LAWS GOVERNING THE APPOINTMENT OF ELECTORS AFTER ELECTION DAY

As demonstrated above, the Constitution specifically grants state legislatures the plenary and exclusive authority to appoint electors. U.S. Const., Art. II, § 1, cl. 2. In accordance with this constitutional command, Congress has vested state legislatures with the authority to prescribe the procedures for appointing electors. *See* 3 U.S.C. §§ 2, 5, 7. Federal law – both constitutional and statutory – therefore clearly vests state legislatures, not state courts, with the sole authority to set the procedures governing the appointment of electors.

A number of provisions of federal law reflect the preeminent role of state legislatures. For example, 3 U.S.C. § 2 recognizes the state legislature's authority, in a case when the State fails to make a valid choice on election day, to

[10] The blatant nature of the Florida Supreme Court's error obviates the need to decide whether a state court's interpretation of a state law concerning the appointment of electors need be grievously wrong or merely erroneous to justify this Court's intervention. Amici submit, however, that this Court possesses jurisdiction to vindicate any error in the interpretation of such laws for at least two reasons. First, Art. II, § 1, cl. 2 gives Petitioner and Amici a right to have electors appointed as directed by the state legislature. Close does not count. Second, laws enacted by state legislatures pursuant to their authority under Art. II, § 1, cl. 2, are properly construed as federal law, rather than state law. *See Case of Electoral College*, 8 F. Cas. 427 (C.C.D.S.C. 1876). Accordingly, deference or a demand for a particularly egregious violation play no role. Of course, even though this Court possesses jurisdiction to correct all errors, it can limit its exercise of that jurisdiction to cases, like this one, that involve egregious misinterpretations of state law (and, therefore, clear violations of federal rights).

appoint electors "*in such a manner as the legislature of such State may direct.*" (emphasis added); *see also* 3 U.S.C. § 7 (granting state legislatures authority regarding the meeting and voting of electors). Congress has recognized that the Constitution vests state legislatures, not state courts, with the authority to frame such election procedures.

Congress not only recognizes the preeminence of state legislatures, it also reinforces the value of setting election rules before election day. *See* 3 U.S.C. § 5. That section states in pertinent part: "If any State shall have provided, *by laws enacted prior to the day fixed for the appointment of the electors* [this year, November 7th] for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State . . . such determination made pursuant to such law so existing on said day. . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution." (emphasis added).

This section ensures that if a State has a procedure in place before election day, a determination made in any controversy pursuant to that procedure "shall be conclusive, and shall govern in the counting of electoral votes." 3 U.S.C. § 5. Here, the Florida Supreme Court has usurped the Florida Legislature's authority by "enacting" new law after the election to replace the governing law that was duly enacted by the Florida Legislature prior to election day. These actions by the Florida Supreme Court violate not only Article II, § 1, cl. 2 of the United States Constitution but also 3 U.S.C. § 5.

A. The Florida Supreme Court Impermissibly Rewrote the Law Governing the Appointment of Electors After Election Day.

The Florida Legislature enacted a procedure long *before* election day to govern the appointment of the electors. The

decision below rewrote those procedures long *after* the votes were cast. That post-hoc judicial lawmaking violated Art. II, § 1, cl. 2 and 3 U.S.C. § 5, as well as the broader maxim that "[e]lections belong to the political branch of the government and . . . are beyond the control of judicial power." *Roe v. Alabama*, 43 F.3d 574, 577 (11th Cir. 1995).

The Florida Legislature has enacted detailed provisions governing elections. Those statutes include provisions for "final determination of any controversy or contest concerning the appointment of any or all electors. . . ." *See* 3 U.S.C. § 5. The Florida Legislature follows 3 U.S.C. § 1 in identifying the date for the appointment of Presidential electors. *See* Fla. Stat. § 103.111. As noted above, Florida law also provides for a November 14th deadline for the filing of returns with the state-wide election Commissioner and directs the Commission that any late-filed returns "shall be ignored." *See* Fla. Stat. § 102.111.

In sum, the Florida Legislature has put in place a detailed procedure that governs elections. The decision below ignored this procedure in favor of a system of the Court's own devising that was not promulgated until after the statutory deadline had passed. This post-election rewriting of the rules by the Florida Supreme Court has created disarray by changing the rules after the game was over.

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). A key element to any system of fair

elections is that the governing authority – here, the Florida Legislature pursuant to Art. II, § 1, cl. 2 – must set the rules in advance. Senator Samuel Smith colorfully described the obvious and special dangers of such a post-election "law to be passed for the occasion" almost two centuries ago in the context of the disputed election of 1800. 1 Dec. 1803, Annals 13:129 (reprinted in 5 Founders' Const. at 453). Senator Smith warned that if it had been attempted to "elect[ ] a President by a law to be passed for the occasion, . . . the person, whoever he might have been, would have met the fate of an usurper, and his head would not have remained on his shoulders twenty-four hours." *Id.* The Florida Supreme Court disregarded both the substantial regulations set in place by the Florida Legislature and the substantial dangers of such retroactive lawmaking in its decision below.

The Court substantially rewrote the statutory provisions for final resolution of controversies and contests in four ways: by changing the mandatory deadline for county canvassing returns to be submitted; by eliminating the Department of State's discretion regarding the acceptance of late returns; by changing the time-line for pre-certification challenges; and by changing the time-line for post-certification challenges.

First, the Florida Supreme Court ignored the Florida Legislature's November 14th deadline in favor of its own deadline of 5:00 p.m. on November 26th. *See* Pet. App. at 38a. The court attempted to justify this decision based on the illusory conflict discussed above. The court's exploitation of a supposed conflict between a direction that late-filed results "shall be ignored" and that such results "may be ignored" to impose a requirement that such results "shall *not* be ignored" defies justification.

However, the Florida Supreme Court's post-hoc exercise

in judicial lawmaking did not end there. In addition to rewriting existing Florida law on certification, the Florida Supreme Court also rewrote deadlines set by the Florida Legislature regarding election challenges. Florida law sets out two procedures for challenging election results. First, before certification, an election "protest" may be lodged with the county canvassing board. Fla. Stat § 102.166. Such a protest must be lodged "prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later." Fla. Stat. § 102.166(2). Accordingly, by rewriting the certification deadline from November 14th to the 26th, the court below also rewrote the deadline for filing election protests.

The Florida Legislature also has prescribed the method for conducting a post-election "contest." Section 102.168 allows a complaint to be filed within 10 days after the last county canvassing board certifies its results or within 5 days after a specific canvassing board certifies its results following a protest pursuant to 102.166(1), whichever is later. This provision recognizes the necessity of certifying results in a timely manner to allow sufficient time for this post-election challenge. Florida statutes require an immediate hearing in a post-election challenge, but also set forth the time for the development of the litigation. A complaint must be filed within ten days after the certification and ten additional days are allotted for an answer. *See* Fla. Stat. § 102.168(2), (6). Of course, the courts must also allow for any necessary pleadings and discovery.

With a congressionally-imposed deadline of December 12th to conclude any election protest, *see* 3 U.S.C. §§ 5 and 7, any ongoing election challenge that precludes a final certification

jeopardizes the inclusion of Florida's electoral votes. By moving the certification date, the Florida Supreme Court cut the time period to litigate a post-election challenge nearly in half, from twenty-nine days to only fifteen days. In light of the relatively brief time period between the federally specified dates for the election and final appointment of electors, the selection of deadlines necessarily requires a balancing of trade-offs. Allowing more time for pre-certification recounts and protests allows less time for post-certification contests. Certain kinds of challenges, such as those involving voter fraud or intimidation, may be better suited for a post-election contest and cannot be remedied by a recount in any event. Accordingly, the setting of deadlines necessitates delicate policy judgments.

Art. II, § 1, cl. 2, delegates those policy judgments to the Florida Legislature and 3 U.S.C. § 5 requires those policy judgments to be made before election day. By rewriting the certification date, the Florida Supreme Court reconsidered all the Florida Legislature's judgments concerning these timing issues and violated both of these provisions of federal law.

B. In Light of Art. II, § 1, cl. 2 and 3 U.S.C. § 5, It Makes No Sense to Allow the Florida Supreme Court To Rewrite the Law Governing the Appointment of Electors After Election Day.

As explained above, Art. II, § 1, cl. 2 prevents the Florida Supreme Court from usurping the Florida Legislature's authority to direct the appointment of electors, and 3 U.S.C. § 5 imposes an additional federal obstacle to judicial lawmaking after election day. Together these two provisions clearly belie the proposition necessarily advanced by Respondents: that the Florida Supreme Court possesses the exclusive authority – to the exclusion of both this Court and

the Florida Legislature – to dictate the content of the law governing the appointment of electors after election day. This suggestion turns federal law on its head.

Art. II, § 1, cl. 2 clearly gives state legislatures a preeminent role in determining the appointment of electors. Section 5 then imposes a sensible non-retroactivity principle. Courts generally interpret statutes in a manner that sets their meaning retroactively. That, however, does not permit state courts to escape the limitations imposed by the Constitution and federal law. Respondents' implicit theory is that when a state court errs in interpreting statutory provisions for appointing electors it neither usurps legislative authority nor creates new law. In fact, such an erroneous decision does both, in clear violation of Art. II, § 1, cl. 2, and 3 U.S.C. § 5.

Respondents' view ignores constitutional text and history. It takes the one branch of state government the Framers thought wholly unsuited for direct participation in the appointment of electors and not only gives it pride of place, but insulates its errors from review. Respondents' view makes hash out of a straightforward delegation of the primary authority over the appointment of electors to state legislatures. The Constitution authorizes this Court to review and correct erroneous judicial constructions of statutory provisions governing the appointment of electors. This Court should exercise that authority and correct the Florida Supreme Court's erroneous decision or defer to the authority of the Florida Legislature to vindicate the meaning of its election laws as they were written.

CONCLUSION

For the foregoing reasons, and those expressed in Petitioner's Brief, this Court should reverse the judgment below.

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November 28, 2000.

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FILE
NOV 28 2000

No. 00-836

Supreme Court, U.S.
FILED
NOV 28 2000
CLERK

In the

SUPREME COURT OF THE UNITED STATES

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, ET AL.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF FOR THE STATE OF ALABAMA, THE ATTORNEY GENERAL OF ALABAMA, AND THE SECRETARY OF STATE OF ALABAMA, AS *AMICI CURIAE*, SUPPORTING REVERSAL

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QUESTION PRESENTED

In this Brief, *amici curiae* address the following question:

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

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INTEREST OF *AMICI CURIAE*

The State of Alabama, the Attorney General of Alabama, Bill Pryor, and the Secretary of State of Alabama, Jim Bennett, respectfully submit this Brief as *amici curiae* pursuant to Sup. Ct. R. 37.4. *Amici* submit this Brief because of the striking similarities between this case and an Alabama case decided by the United States Court of Appeals for the Eleventh Circuit five years ago, *Roe* v. *Alabama*, involving the counting of unwitnessed absentee ballots in the 1994 election for Chief Justice of the Supreme Court of Alabama. That case resulted in a series of decisions from the Eleventh Circuit holding that a post-election change in the procedures for counting absentee ballots violated the First and Fourteenth Amendments, which require state election procedures to be fundamentally fair. *See Roe* v. *Alabama*, 43 F.3d 574 (11th Cir.) ("*Roe I*") (certifying question to Supreme Court of Alabama), *remanded to district court for evidentiary hearing after certified question answered*, 52 F.3d 300 (11th Cir.) ("*Roe II*"), *cert. denied*, 516 U.S. 908, *appeal after remand to district court*, 68 F.3d 404 (11th Cir.) ("*Roe III*"), *stay denied sub nom. Hellums* v. *Alabama*, 516 U.S. 938 (1995). The Petitioner in this case expressly relied upon these decisions of the Eleventh Circuit in requesting review by this Court. *See* Pet. for Cert. at 17–18; 22–26; Pet. App. at 63a–64a. The State of Alabama, by and through its Attorney General, and the Secretary of State of Alabama were defendants in *Roe* v. *Alabama*. *See Roe I*, 43 F.3d at 574; *Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404. The current Attorney General of Alabama, then a deputy attorney general, personally represented the State and the current Secretary of State in that litigation. *See Roe II*, 52 F.3d at 300; *Roe III*, 68 F.3d at 404; *see also Roe* v. *Mobile County Appointing Bd.*, 904 F. Supp 1316, 1317 (S.D. Ala.), *aff'd sub nom. Roe* v.

Alabama, 68 F.3d 404 (11th Cir.), *stay denied*, 516 U.S. 938 (1995).

Relying on the constitutional principles applied in *Roe* v. *Alabama*, the State of Alabama reformed its election laws to ensure that Alabama courts cannot change the rules for counting absentee ballots after an election. *See* Ala. Code § 17-10-10 (Supp. 2000) ("No court or other election tribunal shall allow the counting of an absentee ballot with respect to which the voter's affidavit signature (or mark) is not witnessed by the signatures of two witnesses 18 years of age or older or a notary public (or other officer authorized to acknowledge oaths) . . . ."). The Attorney General and Secretary of State have relied on *Roe* v. *Alabama* in enforcing the election laws of Alabama, advising election officials, and ensuring that election procedures in Alabama are and remain fundamentally fair. *See, e.g.*, Opinion to the Hon. Leland Avery, Hale County Probate Judge, Ala. A.G. Op. No. 2000-180, at 4 (June 26, 2000) <http://www.ago.state.al.us/pdfopinions/2000-180.pdf> ("[T]he United States Court of Appeals for the Eleventh Circuit has held that a systematic counting of unwitnessed and unnotarized absentee ballots violates the voting rights of those voters who complied with the statutory mandates."); Opinion to the Hon. Jim Bennett, Secretary of State, Ala. A.G. Op. No. 99-00227, at 3 (May 31, 1996) <http://www.ago.state.al.us/pdfopinions/99-00227.pdf> ("In this circumstance, under the *Roe* decision, the state election officials cannot count unwitnessed absentee ballots without violating the [F]ourteenth [A]mendment.").

Having now relied on the principles of due process applied in *Roe* v. *Alabama* for several years, *amici* have a profound interest in seeing those principles upheld and consistently enforced, especially in the unique context of

the election of the President and Vice President of the United States, in which all States have a profound interest. Accordingly, *amici curiae* file this Brief to address the due-process component of the first question in this case. In so doing, *amici* argue that the judgment of the Supreme Court of Florida must be reversed because that court changed the rules governing the duties of the Secretary of State of Florida, as well as the rules governing election protests and contests in Florida, in violation of due process and 3 U.S.C. § 5 (1994). *Amici* urge this Court to uphold the First and Fourteenth Amendment guarantees of fundamentally fair election procedures so that States may not, after an election, retroactively change their canvassing, certification, and contest procedures to alter the outcome of an election.

SUMMARY OF ARGUMENT

Because the right to vote is a fundamental right, the constitutionality of state election procedures rests on whether the procedures are fundamentally fair. Fundamental fairness requires election officials to refrain from changing the rules for counting ballots after an election to alter the outcome. Fundamental fairness also requires each State to establish — before an election — objective and meaningful standards for counting ballots and adhere to those standards after the election to protect the First and Fourteenth Amendment rights of both voters and candidates. Adherence to these guarantees of fundamental fairness requires special deference to the authority of legislatures to establish rules for counting votes before an election rather than allowing court to create retroactively rules for resolving post-election disputes. Because the decision of the Supreme Court of Florida violated these requirements of due process and

fundamental fairness in the election of the President and Vice President of the United States, this Court should reverse that decision.

ARGUMENT

I. MATERIAL POST-ELECTION CHANGES IN STATE CANVASSING PROCEDURES VIOLATE DUE PROCESS.

This Court has long held that voting is "a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms. . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968). Because the right to vote is so fundamental, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). In this context, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 554.

In 1995, the United States Court of Appeals for the Eleventh Circuit was called upon to apply these principles in *Roe* v. *Alabama*, a case involving a state circuit court's order to count absentee ballots that had not been properly witnessed or notarized in accordance with state law. The Eleventh Circuit correctly observed in *Roe I* that "federal courts do not involve themselves in garden variety election disputes. If, however, the election process itself reaches the point of fundamental unfairness, a violation of the due process clause may be indicated and relief

under § 1983 therefore in order." 43 F.3d at 580 (citations and internal quotation marks omitted) (quoting *Curry* v. *Baker*, 802 F.2d 1302, 1315 (11th Cir.), *cert. denied*, 479 U.S. 1023 (1986), in turn quoting *Welch* v. *McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985), and *Duncan* v. *Poythress*, 657 F.2d 691, 703 (5th Cir. Unit B Sept. 1981), *cert. denied*, 459 U.S. 1012 (1982)). Like the case now before this Court, however, *Roe* was no "garden variety" election dispute. Like this case, the post-election change in election procedures by the state courts raised serious questions about the fundamental fairness of the election process. Because the situation in *Roe* v. *Alabama* was so similar to the present case, *Roe* provides an excellent analytical framework for examining the due process principles at stake in this case.

A. *Roe* v. *Alabama*

Before the November 1994 general election, it was a uniform statewide practice in Alabama to disregard absentee ballots that had not been properly notarized or witnessed. *Roe I*, 43 F.3d at 578; *Roe III*, 68 F.3d at 406–07 (stating that the district court's findings, which were "supported overwhelmingly by the evidence," showed there had been no prior practice, in 66 of Alabama's 67 counties, of counting improperly executed absentee ballots). A state circuit court nonetheless ordered unwitnessed absentee ballots to be counted after the 1994 general election. Because the candidates for Chief Justice were separated by a mere 200 to 300 votes before the court entered its order, the order placed the outcome of the race for Chief Justice in doubt. *Roe I*, 43 F.3d at 578. As the Court is no doubt aware, the 200 to 300 vote spread in *Roe* was similar to the narrow margin separating presidential candidates George W. Bush and Albert Gore, Jr., in the election in Florida.

The Alabama court's order was challenged in a 42 U.S.C. § 1983 (1994) action brought in the United States District Court for the Southern District of Alabama. The district court promptly granted a preliminary injunction halting the counting of unwitnessed absentee ballots. In its order, the district court specifically found that it was an established practice in Alabama not to count unwitnessed absentee ballots. Moreover, the district court held that adhering to the state court order and changing the practice of not counting unwitnessed absentee ballots would violate the First and Fourteenth Amendments. *Roe I*, 43 F.3d at 579.

On appeal to the Eleventh Circuit, the *Roe* plaintiffs argued that enforcement of the state court order

> would constitute a retroactive validation of a potentially controlling number of votes in the elections for Chief Justice and Treasurer that would result in fundamental unfairness and would violate plaintiffs' right to due process of law in violation of the Fourteenth Amendment, and that this violation of the plaintiffs' rights to vote and . . . have their votes properly and honestly counted constitutes a violation of the First and Fourteenth Amendments.

Id. at 580 (internal quotation marks omitted). The *Roe* plaintiffs further argued "that the [state] circuit court's order requiring the state's election officials to perform the ministerial act of counting the contested absentee ballots, if permitted to stand, will constitute a retroactive change in the election laws that will effectively 'stuff the ballot box,' implicating fundamental fairness issues." *Id.* at 581 (footnotes omitted). The Eleventh Circuit agreed with the *Roe* plaintiffs and determined that departing from Alabama's longstanding policy of not counting

unwitnessed absentee ballots would indeed violate the First and Fourteenth Amendments.

In deciding *Roe I*, the Eleventh Circuit held that departing from Alabama's previous practice of not counting unwitnessed absentee ballots "would have two effects that implicate fundamental fairness." *Id.* "First, counting ballots that were not previously counted would dilute the votes of those voters who met the [statutory] requirements . . . . Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the [statutory requirements]." *Id.* The court also stated that "had the candidates and citizens of Alabama known that something less than the signature of two witnesses or a notary attesting to the signature of absentee voters would suffice, campaign strategies would have taken this into account and [those] who did not vote would have voted absentee." *Id.* at 582 (distinguishing *Partido Nuevo Progresista* v. *Barreto Perez*, 639 F.2d 825 (1st Cir. 1980), *cert. denied*, 451 U.S. 985 (1981)). On these grounds — that retroactively counting improperly executed absentee ballots would disenfranchise or dilute the votes of others and that altering election rules *post hoc* would upset the legitimate expectations of the voters and candidates — the Eleventh Circuit ruled that complying with the state court's *post hoc* change in election procedures would violate the First and Fourteenth Amendments.

The Eleventh Circuit refused to require the Roe plaintiffs to pursue their claims in state court. *Id.* at 582. The court noted that, under Ala. Code § 17-15-6 (1995), Alabama courts are jurisdictionally barred from deciding statewide election contests. The court concluded that the state legislature, which has exclusive authority to decide

an election contest involving the office of Chief Justice, *see* Ala. Code § 17-15-52 (1995), was an "not an adequate or proper forum for the resolution of the federal constitutional issues presented." *Roe I*, 43 F.3d at 582.

The Court of Appeals did, however, abstain from finally adjudicating the plaintiffs' claims to certify a question to the Alabama Supreme Court asking whether absentee ballots that were not properly notarized or witnessed could nonetheless be counted under Alabama law. *Id.* at 583. The Supreme Court of Alabama, in answering the certified question, affirmed the order of the state circuit court and held that unwitnessed absentee ballots in "substantial compliance" with state law should be counted. *Roe* v. *Mobile County Appointment Bd.*, 676 So. 2d 1206, 1221–22 (Ala. 1995).

Within a month of the Alabama Supreme Court's decision, the Eleventh Circuit remanded the case to the district court for trial. *Roe II*, 52 F.3d at 301. The Eleventh Circuit directed the district court specifically to address seventeen factual issues. Chief among these was the question of whether there was an established practice of including or excluding improperly executed absentee ballots in previous elections in Alabama. *Id.* at 302–03. Following *Roe II*, the defendant class of voters who sought to have their unwitnessed absentee ballots counted petitioned this Court for a writ of certiorari. That petition was denied. *Davis* v. *Alabama*, 516 U.S. 908 (1995).

Following a three-day trial, the district court found that "the practice in Alabama prior to the November 8, 1994 election had been uniformly to exclude [improperly executed absentee] ballots." *Roe III*, 68 F.3d at 406–07. Accordingly, the district court concluded the *Roe* plaintiffs were entitled to relief and entered an order directing the Alabama Secretary of State to certify the results of the

Chief Justice and State Treasurer elections without counting unwitnessed absentee ballots. *Id.* at 407. The defendant class of voters that had cast improperly executed absentee ballots then appealed to the Eleventh Circuit. *Id.*

In *Roe III*, the Eleventh Circuit concluded that the district court's findings of fact were "supported overwhelmingly by the evidence." *Id.* The appeals court also reaffirmed its holdings in *Roe I* and *Roe II*. *Id.* at 408. The court again rejected the appellants' plea to abstain and allow the state courts to decide the contested elections for Chief Justice and State Treasurer. The appellants argued, in essence, that state courts should have been given the opportunity to apply the Alabama Supreme Court's opinion in *Roe* v. *Mobile County Appointment Board* and grant them relief by ordering their improperly executed absentee votes to be counted. The Eleventh Circuit, however, rejected this argument, again noting that it was "highly doubtful" that the state courts had jurisdiction to grant such relief given the jurisdictional bar in Ala. Code § 17-15-6. *Id.* The court determined that the Roe plaintiffs had no adequate state forum for the vindication of their federal constitutional claims and promptly affirmed the district court's order. Because time was of the essence, the Court of Appeals directed its clerk to issue the court's mandate instanter.

The defendant class of voters who wanted their improperly executed absentee ballots counted immediately applied for a stay from this Court, and Justice Kennedy granted a temporary stay on October 14, 1995, while this Court considered the matter. The Court then denied the stay application on October 19, 1995. *Hellums* v. *Alabama*, 516 U.S. 938 (1995). Chief Justice

Perry O. Hooper, Sr., was certified as the winner of the 1994 election and sworn into office the next day.

B. The Costs and Consequences of *Roe* v. *Alabama*

Roe v. *Alabama* ended with a reaffirmation of the guarantees of the First and Fourteenth Amendments, as interpreted by this Court, that state election procedures must be fundamentally fair. Unfortunately, however, complete justice was not done because the harm caused by the state circuit court order could not be undone. Because of the state circuit court's order, Chief Justice Hooper was not certified as the winner of the November 1994 election until October 20, 1995. *See* Ala. Rptr., 656–659 So. 2d, at IX n.2. He was sworn in later the same day, more than nine months after he should have taken office on January 16, 1995. *Id.* n.1. As a result of the circuit court's attempt to change the rules for counting ballots after the election, the people of Alabama were deprived of their choice for Chief Justice for more than nine months — one-eighth of his total term of office. The Eleventh Circuit's decision in *Roe* v. *Alabama* could not give those nine months back to the people of Alabama.

What is more, the incumbent Chief Justice, who lost the November 1994 election, "continued in office" during the nine months after his term expired until Chief Justice Hooper was sworn in. *Id.* The State then had to pay salaries to both men for that nine-month period. The litigation itself also cost the State of Alabama hundreds of thousands of dollars.

The process now unfolding in Florida as a result of the change in state law by the Supreme Court of Florida portends different, but perhaps more frightening ills. The process now underway in Florida is undermining public

confidence in the presidency and the Republic itself as voters across the country watch canvassing boards stare at tiny pieces of cardboard to divine whether a voter's "dimpled chad" means the voter wanted to vote for a candidate or decided not to vote at the last minute. If post-election changes to election procedures in Florida are approved by this Court, other states will be flooded with similar post-election litigation. Any disgruntled candidate who loses by a narrow margin will have an incentive to file a protest, argue for a new set of rules, and then keep counting until the votes are "found." Such untoward results are avoided when federal courts uphold the due process requirement that the rules for counting ballots not be changed after the election to alter the outcome.

C. Other Cases Invalidating *Post Hoc* Changes in Election Procedure

Roe represents an extreme example of what can happen when election procedures are changed after an election. The situation in *Roe* was not unique, however. Other circuits have intervened in the name of due process to halt similar, fundamentally unfair *post hoc* changes in election procedures.

In *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970), for example, the Seventh Circuit addressed a change in the petition requirements for candidates for alderman in the City of Chicago. The City Board of Election Commissioners applied a new "anti-duplication" rule to disallow voters' signatures on more than one candidate's petition to run for alderman; the Board also disallowed any signatures without a middle initial. *Id.* at 1055. The Seventh Circuit held that the Board's failure to forewarn candidates of these new, rigorous requirements violated due process. *Id.*

In *Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), the First Circuit ordered a new election after state election officials handed out absentee ballots that were later voided by the state supreme court after the election. *Id.* at 1078–80. The court observed that federal courts have intervened in state elections where

> the attack was, broadly, upon the fairness of the official terms and procedures under which the election was conducted. The federal courts were not asked to count and validate ballots and enter into the details of the administration of the election. Rather they were confronted with an officially-sponsored election procedure which, in its basic aspect, was flawed.

Id. at 1078.

In *Brown v. O'Brien*, 469 F.2d 563 (D.C. Cir.), *stay granted*, 409 U.S. 1 (*per curiam*), *vacated as moot*, 409 U.S. 816 (1972), the District of Columbia Circuit concluded that a political party's retroactive application of a new and unannounced ban on winner-take-all presidential primaries violated due process. *Id.* at 570. The court noted that, if the party had announced its rule change prior to the primaries, candidates might have campaigned differently, voters might have voted differently, and the State of California might have altered its delegate selection scheme. *Id.* at 569–70. The court observed that "there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force." *Id.*

Finally, in *Duncan* v. *Poythress*, 657 F.2d 691 (5th Cir. Unit B. Sept. 1981), *cert. dismissed*, 459 U.S. 1012 (1982), the former Fifth Circuit held that state officials' refusal to hold a special election to fill a vacancy on the state supreme court in accordance with state law violated due process. *Id.* at 708. The court observed that it could "imagine no claim more deserving of constitutional protection than the allegation that state officials have purposely abrogated the right to vote, a right that is fundamental to our society and preservative of all individual rights." *Id.* at 704.

These cases underscore that the right to vote, at bottom, is a *federal* right. *See Griffin* v. *Burns*, 570 F.2d at 1077. If a state election procedure is so flawed as to be fundamentally unfair, that process violates due process. Where, as in *Roe* and in this case, a state supreme court materially changes state election procedure after an election has occurred and while votes are still being counted, that change is fundamentally unfair and violates the due process rights of the voters and the candidates.

II. THE JUDGMENT OF THE SUPREME COURT OF FLORIDA VIOLATES DUE PROCESS BY RETROACTIVELY CHANGING FLORIDA ELECTION PROCEDURES.

As was the case in *Roe* v. *Alabama*, the judgment of the Supreme Court of Florida in this case substantially changed Florida election procedures after the election and applied those changes retroactively. A comparison of Florida law prior to the election and the changes imposed by the Supreme Court of Florida illustrates the unfairness of this result. By changing Florida law after the election, the Supreme Court of Florida violated the First and Fourteenth Amendment rights of the Florida voters and the candidates.

A. The Judgment of the Supreme Court of Florida Retroactively Changed Florida Election Procedures.

At the close of an election in Florida, any candidate or voter may file a protest contending that the election returns are erroneous. Fla. Stat. § 102.166(1) (2000). During the protest period, the individual voters may not petition for a manual recount; only a candidate, political committee, or political party may request a manual recount at this time. Fla. Stat. § 102.166(4)(a). Under the original statutory scheme, the protest period ended after seven days, at which time the election was to be certified. Fla. Stat. § 102.111(1) (2000). After the results are certified, an election contest may be filed. Fla. Stat. § 102.168(1) (2000). Any unsuccessful candidate and any voter or taxpayer may file an election contest. Fla. Stat. § 102.112(1). Although an election contest in Florida has no express time constraint, in the instant case, the contest would have to be complete by the December 12 deadline for selecting presidential electors. *See* 3 U.S.C. § 5. Unlike an election protest, an election contest in Florida provides for full factual pleading of all complaints including misconduct on the part of election officials, receipt of illegal votes, and improper rejection of legal votes. Fla. Stat. § 102.112(3).

By ordering the Secretary of State to accept untimely manual recount returns through Sunday, November 26, at 5:00 p.m.,[1] and to include these returns in the certified

[1] The Florida Supreme Court designated Monday, November 27, at 9:00 a.m., as an alternative time should the Secretary of State's office not be open on Sunday. Pet. App. at 38a.

election results, the court fundamentally altered the nature of election protest and contest procedures under Florida law. Pet. App. at 38a. The holding of the Supreme Court of Florida, that "the Secretary [of State] may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal election process," also fundamentally altered the discretion granted to the Secretary of State by the Florida legislature. *Id.* at 37a.

These material changes in Florida election law, which the Supreme Court of Florida applied retroactively, create a fundamentally unfair result. First, the requirement that election results be tabulated within seven days of the election, Fla. Stat. § 102.111, has been eviscerated. The court instead created a new judicial timetable for protesting and contesting election results: It enlarged the statutory protest period from seven days to 19 days and shortened the contest period from 29 days to 16 days. Pet. App. at 38a. Second, where there was no statutory provision for the filing of amended returns, much less late ones, there is now a judicial mandate that the Secretary of State accept such amended returns unless they are so late as to "preclude a candidate, elector, or taxpayer from contesting the certification of the election . . . or . . . by precluding Florida voters from participating fully in the federal electoral process." *Id.* at 37a. Third, by narrowing the time frame within which a contest may be filed, the Florida Supreme Court restricted the ability of unsuccessful candidates and individual voters to challenge the outcome of the election in an election contest based on allegations of misconduct or illegality.

B. The Judgment of the Florida Supreme Court Gives Greater Weight to Votes In Counties Where a Protest Is Filed by Delaying Election Contests Statewide.

By enlarging the statutory protest period from seven days to 19 days and shortening the contest period from 29 days to 16 days, the Supreme Court of Florida arbitrarily (and retroactively) gave greater weight to votes cast in the counties where protests had been filed by delaying election contests statewide. Under the judicially enlarged protest period, the attendant manual recounts have the effect of placing the votes of the four affected counties under close scrutiny while at the same time denying this scrutiny in the remaining 63 counties where voters must wait for this period to end before they can request that their votes be manually counted as part of an election contest. Only a party or candidate can demand a manual recount in the protest period, Fla. Stat. § 102.166(4)(a), but any voter or tax payer can request manual recounts as part of an election contest to be conducted at the discretion of the circuit judge. *See* Fla. Stat. § 102.168(8).

The votes in the four protest counties were painstakingly examined for 19 days, while those in the remainder of the state will only have the possibility of review for a maximum of 16 days. Thus, the holding of the Supreme Court of Florida has impermissibly given greater weight to votes in the four protest counties than to the votes cast in the rest of the state. "Overweighting and overvaluation of the votes of those living [in a particular area] has the certain effect of dilution and undervaluation of the votes of those living [elsewhere]. . . . Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside,

hardly seems justifiable." *Reynolds* v. *Sims*, 377 U.S. at 563. The judgment of the Supreme Court of Florida favored the counties where protests were filed and diluted the votes from the remainder of Florida in violation of the Due Process Clause of the Fourteenth Amendment.

C. By Changing the Statutory Protest and Contest Periods, the Florida Supreme Court Gave an Unfair Advantage to a Campaign That Chose to "Front-Load" Its Challenges Into the Protest Period.

Under Florida law as it existed at the time of the election, a candidate could reasonably forego requesting a manual recount as part of an election protest because the protest period was so short. The candidate could reasonably choose to save his request for a manual recount until an election contest, where there would be more time. This was particularly true where the contest period was originally over four times longer than the protest period and, in addition to the manual recount, afforded the candidate the opportunity to create a full evidentiary record of all alleged election improprieties or illegality. Fla. Stat. § 102.112(3). As is evident from the events of the past few weeks, a manual recount can be an arduous and time-consuming process taking longer than a week — especially in large counties. A candidate who desired such recounts would likely know this and could reasonably decide to wait and request the manual recounts as part of an election contest where there would be more time.

By enlarging the statutory protest period from seven days to 19 days and shortening the contest period from 29 days to 16 days, the Florida Supreme Court thwarted the reasonable expectations of the candidates and gave a fundamentally unfair advantage to a campaign that chose

to "front-load" its challenges into the protest period. This post-election change benefited the "front-loading" campaign by giving it the majority of the available time for its challenges while reducing the time available to the other campaign to respond in a contest. Had the candidates known that the protest period would have been lengthened, campaign strategies would have taken this into account. *See Roe I*, 43 F.3d at 582; *Brown* v. *O'Brien*, 469 F.3d at 569–70. By retroactively changing the election rules, however, the Supreme Court of Florida deprived the candidates of this opportunity.

D. Counting Improperly Marked Ballots That Were Not Counted in the Past Dilutes The Votes of Those Who Properly Marked Their Ballots.

"A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . ." *Baker* v. *Carr*, 369 U.S. 186, 208 (1962). During this election, the overwhelming majority of Floridians who cast their votes using punch-card ballots did so in accordance with the instructions for properly casting ballots, and those votes were accurately tabulated in keeping with the principles of due process. As noted by the Secretary of State:

> In the weeks before the November 7, 2000, general election, each registered voter in Florida was provided with a sample ballot and detailed instructions on how to vote according to the method used in his or her precinct. Additionally, a copy of the instructions was placed prominently in each voting booth. *See* Fla. Stat. § 101.46. In those districts using punch cards, the instructions explained how a voter was to select and punch out

> the appropriate chad on the ballot. App. at 14a. The instructions included this specific direction:
>
> **AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD.**
>
> *Id.* When voters followed the instructions, including the removal of any loose chips left attached to their ballots, the automatic tabulation accurately tabulated the ballots. There is no contention otherwise. Only the ballots of those voters who, by their own actions, failed to clearly indicate their elective choices, as directed, would be affected by the manual recount at issue.

Harris Resp. to Pet. for Cert. at 15 n.12. Thus, the requirements for casting a correct vote were well established, had been made available to every voter prior to election day, and were followed by the overwhelming majority of voters.

Changing the rules for counting partially punched ballots in the protest counties after the election would be fundamentally unfair. Allowing certain counties to count so-called "dimpled chads" and stray marks as votes constitutes an arbitrary deviation from election rules and dilutes the weight given to votes that were properly punched and counted. A post-election change in manual recount procedures in one county in Florida similarly dilutes the votes of those who submitted partially punched ballots in counties that did not conduct manual recounts.

Changing the rules for counting partially punched ballots only in the protest counties also dilutes the votes of those whose partially punched ballots are left uncounted in their county's manual recount because their county adheres to its pre-election rules. By ordering the Secretary of State to accept arbitrary, untimely recounts and include them in the certified election results, the Florida Supreme Court sanctioned fundamentally unfair practices and violated due process.

E. By Changing the Statutory Protest and Contest Periods, the Florida Supreme Court Deprived Voters of the Right to Prosecute an Effective Election Contest.

Under Florida law, a voter may file an election contest — but only after the election has been certified at the end of the protest period. Fla. Stat. § 102.112(1). By extending the protest period at the expense of the contest period, the Florida Supreme Court has frustrated individual voters' due process rights to an effective election contest by leaving an inadequate length of time for such a challenge.

The contest period was originally over four times longer than the protest period and, in addition to the manual recount, afforded the complaining voter or candidate an opportunity to create a full evidentiary record of all alleged election improprieties or illegality. Fla. Stat. § 102.112(3). As is evident from the events of the past few weeks, a manual recount is an arduous and time-consuming process. Under the original election rules, voters who contested the election would have had 29 days in which to challenge the election and request a manual recount. Under the holding of the Florida Supreme Court, the voters are afforded a mere 16 days,

three days less than the new protest period, and 13 days less than they were entitled to have under Florida law.

Not only has this new judicial timetable prejudiced the rights of voters by greatly restricting the time in which they can pursue a contest, it has also prejudiced any such contest by means of the delay. During the court-ordered delay for election protests, ballots in the protest counties have been repeatedly handled, compromising the physical integrity of the individual ballots. Pet. for Cert. at 5. Thus, evidence material to a contest has been damaged and lost. The Florida Supreme Court's new timetable has, therefore, so prejudiced the voters' due process rights to an effective contest as to constitute a fundamentally unfair result.

F. Counting Partially Punched Ballots Without Clear Standards Attributes Political Speech to Voters Without Their Consent and Dilutes Proper Votes by "Stuffing the Ballot Box."

In *Baker* v. *Carr*, this Court noted that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by . . . a stuffing of the ballot box." 369 U.S. at 208 (citing *Ex parte Siebold*, 100 U.S. 371 (1879), and *United States* v. *Saylor*, 322 U.S. 385 (1944)). Depending on the location, election officials in Florida are currently divining the will of individual voters based on either a discretionary majority vote of local officials or the individual subjective views of the persons handling the ballots. By requiring the Secretary of State to accept the untimely manual recounts and include them in the certified election results, the Florida Supreme Court ordered the acceptance of this standardless procedure and "stuffed the ballot box" in violation of voters' First

Amendment right to freedom of expression and Fourteenth Amendment right to due process.

It is well established that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively ... rank[s] among our most precious freedoms. . . . Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968). The First Amendment protects the right of our nation's citizens not only to entertain their individual political beliefs, but also to express them. *Id.* at 30; *see also Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind.") When a citizen casts a vote, it is the ultimate expression of individual political speech and constitutes the culmination of the individual right to choose the representative governing body.

Where there is no clear standard by which to evaluate inadequately marked ballots, election officials, left to their individual discretion, will inevitably place political speech in the mouths of those voters unwilling to vote for either candidate. For example, voters may enter the voting booth and have second thoughts about their decisions and change their minds mid-vote, leaving a "dimpled chad." If election officials count those indentations as votes, they are "stuffing the ballot box" by putting words into the voters' mouths.[2] The government cannot compel voters to speak when they have chosen to

[2] *See, e.g., United States* v. *Saylor*, 322 U.S. at 388 (holding that electors have the right to have their vote honestly counted and not diluted by stuffing the ballot box).

remain silent. *West Virginia* v. *Barnette*, 319 U.S. 624, 631–41 (1943).

Under the Due Process Clause of the Fourteenth Amendment, voters have the right to have their individual ballots correctly counted and reported. *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963). In this race, numerous ballots were correctly punched for the bulk of the races, leaving the choice for President and Vice President unselected. This indicates that, had these voters wanted to vote for any given presidential candidate, they not only knew how to do so,[3] they had demonstrated their ability to do so. There was no option on these ballots for "NONE OF THE ABOVE." By correctly selecting candidates in other races and leaving only a "dimpled chad" or entirely unmarked portion for the presidential race, these voters exercised their right to refrain from speaking under the First Amendment. *See Wooley*, 430 U.S. at 714. Election officials should not be allowed to speak where voters have remained silent; for, with that silence, these citizens have voiced their views on the presidential race. *See Barnette*, 319 U.S. at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.")

In the absence of a clear standard, the divination of these improperly marked ballots ultimately says more about the intent of the election officials than the intent of the voters. To affirm this arbitrary conduct, this Court would be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it

[3] As previously noted, each voter was informed of the correct means of casting a ballot prior to the election.

open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. By impermissibly attributing this political speech to citizens who elected not to vote in a particular race, election officials effectively "stuff the ballot box" and dilute the weight of the votes of those citizens who actually voted in this race. *Cf. Ex parte Siebold*, 100 U.S. 371; *United States* v. *Saylor*, 322 U.S. 385.

This action has violated the due process rights of those citizens who elected not to vote in this race and expected that their silence would be interpreted as it was intended — as a vote for "NONE OF THE ABOVE." *See Baker* v. *Carr*, 369 U.S. at 208; *United States* v. *Saylor*, 322 U.S. at 388 ("This case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."); *Gray* v. *Sanders*, 372 U.S. at 380 ("The [United States Supreme] Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them . . . correctly counted and reported.' ")(citations omitted). Voters who had second thoughts and left only a "dimpled chad" could reasonably expect, after reading the voting instructions, that their "dimpled chad" would not be counted. Thus, by ordering the Secretary of State to accept the untimely manual recounts and include them in the certified election results, the Florida Supreme Court violated the due process rights of both the voters who clearly selected a presidential candidate and the voters who chose to abstain from casting a vote in the presidential election.

III. BOTH *ROE* V. *ALABAMA* AND THIS CASE ILLUSTRATE THE IMPERATIVE OF LEGISLATIVE, NOT JUDICIAL, SUPREMACY IN ESTABLISHING ELECTION RULES TO ENSURE FUNDAMENTAL FAIRNESS.

Another similarity between the *Roe* litigation and the decision of the Florida Supreme Court is the special need for deferring to the exclusive, constitutional authority of legislative bodies to establish rules for voting before an election rather than allowing courts to create rules for voting to apply retroactively in post-election disputes. In both the *Roe* litigation and this case, the state courts failed to defer to the supremacy of the legislatures with disastrous results. In each case, the legislature also had sought to prevent the judicial chicanery that later occurred. Federal relief then became necessary to fulfill the guarantees of the First and Fourteenth Amendments that state courts not change legislative rules retroactively to alter the outcome of an election.

In the *Roe* litigation, the State's pre-election rules plainly prohibited post-election intervention by the Alabama courts. Indeed, the Alabama Legislature had prohibited judicial intervention in elections in the following extraordinary terms:

> No jurisdiction exists in or shall be exercised by any judge, court or officer exercising chancery powers to entertain any proceeding for ascertaining the legality, conduct or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute; and any injunction, process or order from any judge, court or officer in the exercise of

> chancery powers, whereby the results of any election are sought to be inquired into, questioned or affected, or whereby any certificate of election is sought to be inquired into or questioned, save as may be specially and specifically enumerated and set down by statute, shall be null and void and shall not be enforced by any officer or obeyed by any person; and should any judge or other officer hereafter undertake to fine or in any wise deal with any person for disobeying any such prohibited injunction, process or order, such attempt shall be null and void, and an appeal shall lie forthwith therefrom to the supreme court then sitting, or next to sit, without bond, and such proceeding shall be suspended by force of such appeal; and the notice to be given of such appeal shall be 14 days.

Ala. Code § 17-15-6 (1995) (discussed in *Roe I*, 43 F.3d at 577–78 & n.4; *Roe III*, 68 F.3d at 408–09 & n.7). In the *Roe* context of the election of the Chief Justice, Alabama law also provided that only the state legislature could hear and decide an election contest. Ala. Code §§ 17-15-50 to 17-15-63 (1995) (discussed in *Roe I*, 43 F.3d at 577).

The Eleventh Circuit found these provisions "especially significant in light of the common law of Alabama." *Id.* at 578 n.4. The *Roe* court recognized that Alabama law required strict adherence to legislative rules in an election contest:

> [E]lection contests exist only by virtue of statutory enactment and such statutes are to be strictly construed. [*Groom v. Taylor*, 235 Ala. 247, 178 So. 33 (1938)]. "The right to contest an election is not a common-law right (*Cosby v. Moore*, 259 Ala. 41, 65 So.2d 178 [(1953)]). Elections belong to the political branch of the government, and, in the

> absence of special constitutional or statutory provisions, are beyond the control of judicial power." 29 C.J.S. Elections § 246. Further at § 247 the rule is stated that statutes providing for election contests "should be strictly construed or observed as to those provisions for inaugurating the contest and which are necessary to jurisdiction [citing *Walker v. Junior*, 247 Ala. 342, 24 So. 2d 431 (1945); *Groom*, 235 Ala. 247, 178 So. 33] . . . . An election contest being purely statutory, the courts are limited in their investigation to such subjects as are specified in the statutes. The remedy is not to be extended to include cases not within the language of the statute; and the right of contest is not to be inferred from doubtful provisions."

Roe I, 43 F.3d at 578 n.4 (quoting *Longshore* v. *City of Homewood*, 277 Ala. 444, 446, 171 So. 2d 453, 455 (1965)).

Similarly, this case presents important issues of legislative supremacy in election matters that call into question the fundamental fairness of the decision of the Florida Supreme Court. The ultimate source of that legislative supremacy, of course, is the Constitution, which provides "Each State shall appoint, *in such manner as the Legislature thereof may direct*, a Number of Electors . . . ." U.S. Const. art. II, § 1 (emphasis added). The Constitution does not refer this matter to the entire State government but to the State Legislature alone. Likewise, the National Legislature required, more than a century ago, that any post-election controversy regarding the appointment of presidential electors be resolved "by laws enacted prior to the day fixed for the appointment of the electors." 3 U.S.C. § 5. Representative William Craig Cooper of Ohio explained, in the congressional debate on

this law, that Congress should prevent state judicial mischief in the appointment of presidential electors: "How could any court, how could any tribunal intelligently solve the claims of parties under a law which is made concurrent, to the very moment perhaps, with the trouble which they are to settle under the law?" 18 Cong. Rec. 47 (Dec. 8, 1886). Congress also provided that in the event of any failure to appoint electors "on the day prescribed by law, the electors may be appointed on a subsequent day *in such a manner as the legislature of such state may direct*." 3 U.S.C. § 2 (1994) (emphasis added).

Both the Framers and Congress contemplated that the appointment of presidential electors was to be the exclusive province of state legislatures. "Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps, in most cases, of themselves determine it." The Federalist No. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961). As in *Roe*, the judicial usurpation of this state legislative authority by the Supreme Court of Florida violated the Constitution, and its fundamental unfairness must be redressed by the federal judiciary.

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

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Supreme Court, U.S.
FILED
NOV 28 2000
CLERK

NOV 28, 2000

(21)

No. 00-836

In the Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

vs.

PALM BEACH COUNTY CANVASSING BOARD, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF THE STATES OF IOWA, CALIFORNIA, CONNECTICUT, HAWAII, INDIANA, MAINE, MARYLAND, MASSACHUSETTS, MONTANA, NEVADA, NEW MEXICO, OKLAHOMA, OREGON, AND RHODE ISLAND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

This case comes before the Court under the most extraordinary circumstances. The tumultuous presidential election has created an emotionally charged atmosphere and raised a multitude of issues in the state and federal courts, many of which are questions of first impression. At the core of this controversy are basic questions of federalism which could affect the delicate relationship between the federal and state governments, and the judicial branches of those governments. These principles, which are basic to our federal system of government, must not be overlooked in the midst of heated political rhetoric.

The *amici* States have a strong interest in preserving the rights of the individual states to control the election of presidential electors. The *amici* States want to ensure that the state judiciaries remain free to interpret state laws governing elections, without interference by the federal courts, as they have done for nearly 200 years. And the *amici* States have a compelling interest in guarding against the erosion of these fundamental principles of federalism in any way that could impair the rights of the states to govern their affairs in other matters that have been entrusted to them by the United States Constitution.

This Court has a unique opportunity to clarify for the American public the basic workings of the state and federal judiciaries and their proper roles in our federal and state schemes of government. The *amici* States believe that this Court can take a significant step toward healing the nation from the divisiveness that has resulted from the presidential election and in giving credibility to the final result of this election – whatever that might be. The *amici* States respectfully request this Court to undertake that process with due regard for fundamental principles of federalism.

SUMMARY OF THE ARGUMENT

The fundamental question before the Court is whether the state or federal courts are the final arbiters of state law. This case is based on a claim that the Florida Supreme Court retroactively changed the law and impinged on the Florida Secretary of State's discretion when it interpreted Florida's election code, and thereby violated the due process clause of the United States Constitution and 3 U.S.C. § 5. Closely related is the claim that the Florida Supreme Court changed the election laws passed by the Florida legislature, in derogation of the legislature's constitutional right to control the manner in which presidential electors are appointed pursuant to Article II, section 1 of the United States Constitution.

Because the actions of the Florida Supreme Court in interpreting state law are being reviewed by the United States Supreme Court, fundamental questions of federalism become paramount. State courts traditionally have been charged with the responsibility of interpreting state law. For nearly 200 years, this Court has deferred to state courts on questions regarding the meaning of state laws. Any departure from that tradition would significantly alter fundamental notions of federalism.

There is no justification in this case for such an erosion of federalism. The Florida Supreme Court did not retroactively change the law. It simply interpreted a state law, according to traditional rules of statutory construction, with the result being that the Florida Supreme Court explained its interpretation of what the statutory law had been since the date it was adopted. The Florida Supreme Court was guided by the cardinal principle that its task, in interpreting ambiguous and inconsistent statutes, was to give effect to the intent of the Florida legislature.

If this Court were to superimpose its judgment on that of the Florida Supreme Court in matters of state law, such action would constitute a remarkable intrusion by the federal government into the province of the state judiciary. It would

constitute a significant erosion of fundamental principles of federalism, and could have effects far beyond this case.

If this Court were to strike down the Florida Supreme Court's interpretation of a Florida statute as a retroactive change of the law, it would find itself on a slippery slope of claims alleging "retroactive" application of laws and *ex post facto* laws whenever a court interpreted a statute for the first time. Indeed, the federal courts themselves would be beset with claims that they had retroactively changed the laws whenever they engaged in statutory construction.

Under basic principles of comity and federalism, this Court should respect the Florida Supreme Court as the final arbiter of state law and dismiss this petition.

ARGUMENT

I. Basic Concepts of Federalism Are At the Core of This Case

Amidst the furor over the presidential election, it is important to reflect on one of the basic principles underlying our democracy:

> Federalism was our nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system, unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

The dual sovereignty of the states and the federal government is manifested in the Constitution both implicitly and explicitly. The states' residual sovereignty was implied by Article I, section 8, which conferred upon Congress only certain discrete, enumerated powers. The sovereignty of the states was later explicitly recognized by the Tenth Amendment, which acknowledged that those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Printz v. United States*, 521 U.S. 898, 919-20 (1997).

No power of the states is more clearly recognized in the Constitution than the power to control elections – particularly with regard to the appointment of electors for President of the United States. *See* U.S. Const. art. II, §1. It is that constitutional power in particular, and the sovereign powers of the states in general, which are now being challenged before this Court.

II. The Constitution and Congress Have Given The States Considerable Power to Control Elections for President of the United States.

A. The State Legislatures Are Vested With the Power to Enact Statutory Schemes Regulating the Conduct of Elections

The authority to control the appointment of electors for President of the United States is vested in the states by virtue of both the United States Constitution and federal statute. Article II, section 1, clause 2 of the Constitution gives the states exclusive control over the process by which presidential electors are chosen: "Each state shall appoint, *in such manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the

State may be entitled in the Congress." U.S. Const., art. II, § 1, cl.2 (emphasis added).

Congress has confirmed the power of the states in this area by authorizing the states to establish procedures for conclusively resolving disputes over the appointment of electors:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination . . . shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution . . . .

3 U.S.C. § 5.

This Court has recognized the plenary authority of the state legislatures to control the manner of selecting presidential electors. In *McPherson v. Blacker*, 146 U.S. 1 (1892), the Court held that the Constitution "recognizes that the people act through their representatives in the legislature, and leaves it to the *legislature exclusively* to define the method of effecting the object [of selecting presidential electors]." *Id.* at 27. (*Emphasis added*).

The states have been given similar authority to control the manner in which United States Senators and members of the House of Representatives are elected to office. U.S. Const. art.1, § 4. Although those powers are not as plenary as the powers regarding presidential electors, they are still quite extensive: "This court has recognized the breadth of those

powers . . . ." *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972). *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-96 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

This Court has acknowledged that, as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and orderly. As a result, "the States have evolved *comprehensive, and in many respects complex, election codes* regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v. Brown*, 415 U.S. 724, 730 (1974) (*emphasis added*).

B. The State Judiciaries Are Vested With the Power to Interpret the State Election Codes

The constitutional provisions and federal law vesting power in the states to control the manner of elections and, in particular, the manner of selecting the electors for President of the United States, have necessitated the adoption of comprehensive, often complex election codes by the states. The statutory scheme enacted by Florida, at issue in this case, is but one example of such a scheme. A foreseeable, indeed, unavoidable consequence of detailed legislative schemes of this type is that statutory ambiguities and inconsistencies arise. When this occurs, it is incumbent upon the judicial branch to interpret those statutes, to clarify their ambiguities, and to resolve their inconsistencies where possible. "The judicial department of every government is the rightful expositor of its laws . . . ." *Bank of Hamilton v. Lessee of Dudlee,* 27 U.S. 492, 524 (1829).

In our federal system based upon dual sovereignty, when questions of state law arise, the *state* judiciary is the proper and final arbiter of the meaning of the state statute. This was explained as follows by Chief Justice Marshall:

> This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognised, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government . . . . We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute . . . . [T]he construction given by the Courts of the several States to the legislative acts of those States, is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States.

Elmendorf v. Taylor, 23 U.S. 152, 159-60 (1825).

Indeed, as a general proposition, it is beyond dispute that, "[w]here a state court has interpreted a provision of state law, [the Court] cannot ignore that interpretation, even if it is not one that we would have reached if we were construing the statute in the first instance." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 412 (1992). Even where this Court is empowered to protect an underlying federal right that is threatened by the interpretation of state law, it will not do so unless the interpretation is "so certainly unfounded that it properly may be regarded as essentially arbitrary." If the interpretation has "fair support" in state law, the Court is "not at liberty to inquire whether it is right or wrong, but must accept it, as [it does] other state decisions of non-Federal questions." *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

When the states were given the power to regulate the manner in which elections are conducted, that power necessarily involved both the state legislatures and the state judiciaries. The legislatures were given the authority and the responsibility to enact appropriate statutory schemes to govern the conduct of elections. The state judiciaries were charged with the responsibility to interpret those statutes, just as they interpret all other statutes enacted by their state legislatures. And in our federalist system of dual sovereignty, the federal courts defer to the state courts on the interpretation of state law. Nearly two centuries of precedent and time-honored principles of federalism mandate that the Florida Supreme Court's interpretation of Florida law be considered final.

III. There Is No Reason In This Case For The Court to Abandon Basic Principles of Federalism By Interfering With The Decision of The Florida Supreme Court

The petitioner has attempted to federalize a state law issue by characterizing the Florida Supreme Court's decision as one which substantively changed Florida's election laws after the date of the election and infringed upon the right of the legislature to control the manner of selecting presidential electors.[1] An examination of the Florida Supreme Court's

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[1] It should be noted that this case does not involve claims that the Florida election code, as interpreted by the Florida Supreme Court, violates the Voting Rights Act, 42 U.S.C. § 1971, or the First or Fourteenth Amendments to the United States Constitution because of any course of conduct sanctioned by the Florida Supreme Court. If such prohibited conduct occurred as a result of state legislative or judicial action, this Court would become involved. *See, e.g., Williams v. Rhodes*, 393 U.S. 23 (1968). No such prohibited conduct is alleged in this case. The constitutional claims before this Court arise primarily out of the fact that the Florida Supreme Court interpreted the Florida election code after election day, thereby allegedly retroactively changing the law in violation of due process and other

decision indicates, however, that it was nothing more than the normal exercise by the judiciary of its authority to interpret state legislation, to clarify ambiguities in that legislation, and to resolve inconsistencies in that legislation, all for the purpose of effectuating the intent of the Florida legislature. Accordingly, this Court should not permit itself to be drawn into reviewing the substance of the Florida Supreme Court's interpretation.

A. The Florida Supreme Court's Decision Did Not Constitute A "Post-Election" Change in the Law

The Florida Supreme Court's decision consisted entirely of interpreting and reconciling Florida statutes which were inconsistent and ambiguous. By interpreting the statutes after the date of the election, however, the Florida Supreme Court did not engage in "post-election" lawmaking. Indeed, this Court has recognized that "judicial construction of a statute is an authoritative statement of *what the statute meant before as well as after the decision* of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994) (*emphasis added*). "[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 313 n.12. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 215 (1995). Consistent with these principles, the decision of the Florida Supreme Court constitutes an explanation by that court of its understanding of what the Florida statutes have meant since the date they became law, which was prior to the election. That does not constitute "post-election" lawmaking.

The analysis utilized by the Florida Supreme Court in interpreting the Florida election statutes was neither unusual nor surprising. The Florida Supreme Court attempted to determine

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constitutional provisions. If the Florida court had interpreted the Florida election code before the election, it is unlikely that this case would be before the Court.

the legislature's intent, "the polestar that guides a [Florida] court's inquiry into the provisions of the Florida Election Code." (App.23a). The Court followed traditional rules of statutory construction throughout its opinion. (App. 23-26a). It applied the rule that specific statutes control general ones, which this Court also uses routinely. *See, e.g. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-26 (1989); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 151 (1976). It relied on the canon that newer statutes control older ones, a perfectly logical presumption that this Court also applies. *See, e.g., United States v. Estate of Romani*, 523 U.S. 517, 532 (1998). The Court applied the rule that statutes should be interpreted in a manner that avoids rendering other statutory provisions meaningless or absurd, an approach that also is utilized by this Court. *See, e.g., Ratzlaf v. United States*, 510 U.S. 135, 141 (1994); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Finally, the Florida Supreme Court applied the canon that statutes should be read in their entirety, which is also applied in this Court. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S. Ct. 1291, 1300 (2000). Against this background, the Florida Supreme Court plainly did not "enact" new law; it simply interpreted laws which were in existence prior to election day.

B. The Florida Supreme Court Did Not Encroach Upon The Power of The Legislature

Petitioners's argument that the Florida Supreme Court encroached upon the power of the Florida legislature to control the manner in which presidential electors are appointed, in violation of Article II, section 1 of the Constitution, ignores the reality of how state governments function. The Florida legislature had a duty under the Constitution and federal law to enact legislation governing the manner in which presidential electors would be elected. It was the proper function of the judiciary to interpret those election laws when interpretation became necessary as a result of ambiguities, inconsistencies, or

other uncertainties in the meaning of those laws. Rather than encroaching on the authority of the legislature, the Florida Supreme Court was attempting to give effect to the legislature's statutory scheme. That is exactly what a state supreme court is supposed to do. Therefore, it is incumbent upon this Court, as a federal court, to respect the Florida Supreme Court's interpretation of its state election laws. *McPherson v. Blacker*, 146 U.S. 1, 23 (1892) ("We are not authorized to revise the conclusions of the state court on these matters of local law.")

IV. Overturning the Decision of the Florida Supreme Court Would Have Serious Adverse Consequences for Both the Federal and State Judiciaries

The states are clearly charged with the duty to establish the manner of selecting presidential electors. The Florida legislature has performed its function by adopting the state election laws in question. The Florida Supreme Court, likewise, has performed exactly as a Supreme Court should. It would be highly offensive to basic principles of federalism for this court to superimpose its judgment on the Florida Supreme Court or to disagree or change the interpretation of state law rendered by that court. Indeed, such action by this Court would be a remarkable intrusion into the province of the state judiciary.

If this Court accepts the claim that the Florida Supreme Court invaded the province of the legislature by merely interpreting the Florida election code, it will fundamentally alter the separation of powers that presently exists between the legislative and judicial branches of government. Such a decision by this Court would diminish the authority of the state judiciary to be the final arbiter of the meaning of state law, leaving every state court decision open to appeal to the federal courts on due process grounds. And, if this Court superimposes its judgment on that of the Florida Supreme Court, it might find itself or the lower federal courts embroiled in the process of managing the final resolution of the Florida election disputes.

If this Court were to hold that the Florida Supreme Court's interpretation of Florida law constituted a retroactive "change" in the law, rather than an explanation of what the law had always been, this Court would be opening the door to a flood of due process claims. Whenever a court adopted a new interpretation of a statute, or answered a question of statutory interpretation for the first time, individuals adversely affected by the decision could claim a violation of due process rights. Whenever the courts were required to interpret statutes with civil or criminal penalties, such as consumer fraud statutes, to apply to new factual situations, adversely affected parties could claim a violation of due process rights. Any new interpretation of a criminal statute could lead to claims of *ex post facto* laws in violation of Article I, section 10 of the Constitution. Indeed, this Court itself engages in statutory construction of federal statutes. Litigants could very well claim that new interpretations of federal statutes by this Court, or other federal courts, give rise to claims that their due process rights were violated.

Although the presidential election is unquestionably important to the people of this nation, upholding the basic principles of federalism is equally important and perhaps could have longer lasting effects on ths nation than the decision as to who will be our next president. This Court should follow well-recognized principles of comity and federalism and respect the decision of the Florida Supreme Court as a binding interpretation of Florida law, regardless of whether it agrees with the substance of the Florida court's analysis. To do otherwise would plunge this Court into the province of the state judiciary, in substantial derogation of the basic principles of federalism which have guided this country since its inception.

CONCLUSION

This Court should be guided by fundamental principles of federalism in resolving the issues presented by this highly charged case. The matters presented to the Court are truly

matters of state law, and it is appropriate that they be resolved by the Florida Supreme Court, without interference from the federal government. The Court is respectfully urged to dismiss the petition.

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NOVEMBER 28, 2000

Supreme Court, U.S.
FILED
NOV 28 2000
CLERK

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,
Petitioner,
v.

PALM BEACH COUNTY CANVASSING BD., ET AL
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF COALITION FOR LOCAL SOVEREIGNTY SUPPORTING WRIT OF ERROR TO SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I. Does the US Constitution give a constitutional "right to vote" for presidential electors?

II. Did Congress intrude upon an area of law constitutionally reserved to the States in adopting the Uniformed and Overseas Citizens Absentee Voting Act?

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INTEREST OF AMICUS CURIAE[1]

As the only national organization devoted to the support of state and local sovereignty as an uncompromising principle, Coalition for Local Sovereignty approaches the current case, not from the standpoint of one party or the other, but with no other interest than to preserved fundamental principles of federalism which are at issue in this case.

We believe that CLS brings to the case a unique perspective which will not reflect the narrow political interest of either party.

Counsel to the petitioner, and counsel to the respondent have consented to the filing of this amicus brief. General letters of consent from the counsel to the petitioner, and from the counsel to the respondent are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

Although selection of electors is a matter almost exclusively of State law, the Supreme Court of Florida in its ruling in the current case did make two determinations with respect to federal law, which are subject to review by this Court.

1. The Florida Court ruled that the "right to vote" in presidential elections was guaranteed by both state and federal law. The US Constitution, however, in granting to State legislatures full

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission. Pursuant to the Court's order in the Grant of Certiorari, this brief has been prepared in accord with Rule 33.2.

authority to determine the manner of selecting electors means that citizens of a State have no constitutional right to vote for president. The possibility of voting is left at the option of the State legislature. The "right to vote" insofar as it may or may not exist, is not a right guaranteed by federal law, as the Florida Court suggested. A clarification of this point by this Court, would help clarify an important matter of federalism, and help legitimate appointment of electors by the State legislature, should this become necessary either in the current dispute or in some future dispute.

2. The Florida Court relied in its decision upon the belief that the Uniformed and Overseas Citizens Absentee Voting Act was a constitutional preemption of State law. In passing the Uniformed and Overseas Citizens Absentee Voting Act Congress relied upon its grant of power in Article 1 section 4 of the US Constitution which grants that "Congress may at any time make or alter such regulations" as to the "manner of holding elections for senators and representatives." The Constitution, however, gives Congress no such power with regard to selection of presidential electors. The Uniformed and Overseas Citizens Absentee Voting Act therefore was an unconstitutional attempt by Congress to usurp a power reserved to the States. As such, State law requiring that all absentee ballots must be received by 7 p.m. on the day of election, is controlling.

ARGUMENT

I. The US Constitution does not give individuals the right to vote for president, or presidential electors.

A. THE method of choosing presidential electors is vested exclusively with the States.

It is no doubt believed by most Americans that there is a constitutional right to vote for president. There is no such right in the US Constitution. Art 2 sect 1 merely declares that each State shall appoint electors in such manner as each state legislature shall determine. Likewise, the Twenty-third Amendment says that the District of Columbia will appoint electors "in such manner as Congress may direct."

We believe that a clarification by this Court, that there is no constitutional right to vote for president, and that popular suffrage in presidential elections is a matter of State law, would be beneficial and would help clarify the authority of the State legislature to appoint electors as may be necessary in the current controversy.

Appointment by the State legislature might well be viewed by some people as an illegitimate means of determining electors, a reaffirmation of that principle by this court could help to guarantee the perceived legitimacy of the president-elect, should the legislature of Florida be the deciding factor in the election.

1. The Constitution guarantees the right to vote for Congress but not Presidential electors.

The Constitution makes explicit and important distinction between elections to Congress and selection of presidential electors. Art 1 section 2 says that members of the House of representatives shall be chosen "by the people," while the Seventeenth Amendment says that Senators shall also be chosen "by the people." In addition, Art 1 sect 4 says that with regard to Congressional elections

"Congress may at any time make or alter such regulations" prescribed by the State legislatures. In start contrast to this wide latitude given Congress with regard to Congressional elections, Art 2 simply says that each State shall appoint electors "in such manner as the legislature thereof may direct."

Comparison of the language of Article 1 and Article 2 leaves no doubt as to the plenary power of State legislatures in appointing electors.

State legislatures are under no Constitutional obligation to permit a popular vote. If a state legislature decides to have some sort of popular election for president then such election cannot discriminate against voters on the basis of race (Amdt 15), sex (Amdt 19), age (Amdt 26) or failure to pay a poll tax (Amdt 22). Other than that, the Constitution places no restrictions on a State legislature's authority to run elections. The only other limitation is that Congress in certifying a presidential election, appears to have authority to reject a State's electoral vote if it regards the method of appointment as nefarious or underhanded.

2. The Fourteenth Amendment does not include the right to vote.

Parties on both sides of this issue have argued that there is a federal right to vote contained in the Fourteenth Amendment. There is not.

If a state legislature decides to have some sort of popular election for president then such election cannot discriminate against voters on the basis of race (Amdt 15), sex (Amdt 19), age (Amdt 26) or failure to pay a poll tax (Amdt 22). If Congress, or the Courts, were empowered by the Fourteenth Amendment to direct state elections, then these amendments would be unnecessary,

and superfluous.

It was the position of this Court for an entire century, and it is totally clear from both the text of the Constitution itself, and the legislative history of the adoption of the Fourteenth and Fifteenth Amendments, that the"equal protection clause" does not include the right of suffrage.

Statements by the framers of the Fourteenth Amendment that right to suffrage was not included were numerous and explicit.

Senator Bingham, principle author of Fourteenth Amendment declared:

> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. . . .To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States (Globe 2542).

Acting Chairman of the Senate Reconstruction Committee, Senator Howard, explained the meaning of the Equal Protection Clause to the Senate as follows:

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. ... But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive *local* law (Globe 2766).

Numerous statements by other legislators of their understanding of the wording of the Fourteenth Amendment concur. We cite just a couple here. Senator Miller declared:

> Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation for male citizens not less than twenty-one years of age, whether white or black, who are deprived of the exercise of suffrage. This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for

itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age (Globe 2510).

Senator Johnson, declared:

> Again, Mr. President, the measure upon the table, like the first proposition submitted to the Senate from the committee of fifteen, concedes to the States . . . not only the right, but the exclusive right, to regulate the franchise. . . . It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the Government of the United States will be impotent to redress. (Globe 3027).

These statements and similar ones which could be cited leave no doubt as to the original intent of the framers.

This Court has also long maintained the view that suffrage was not guaranteed by the Fourteenth Amendment. Proponents of women's suffrage repeatedly argued, and this court repeatedly rejected, the view that the Fourteenth Amendment's equal protection and/or due process clauses guaranteed the right to vote. Although women were undoubtedly "free citizens of the United States" citizenship did not include the right to vote.

In *Minor v. Happersett*, 21 Wall. 162, (1874) this Court ruled that:

> [A]fter the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?

In *Guinn v. United States*, 238 U.S. 347 (1915) this court ruled:

> Beyond doubt the [Fifteenth] Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

The Court also made clear in *Guinn* that any restriction on the States' control over elections was a result of the Fifteenth Amendment, not the Fourteenth: "the United States . . . says State power to provide for suffrage is not disputed, although, of course, the authority of the Fifteenth Amendment and the limit on that power which it imposes is insisted upon." No reasonable interpretation of the Fourteenth, Fifteenth, Nineteenth, Twenty-second and Twenty-sixth Amendments taken together can conclude otherwise.

As Madison noted in *Federalist 41*, the "enumeration of particular powers" by the Constitution excludes all pretense to a general powers: "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?" The same argument applies to the Fifteenth, Nineteenth, Twenty-second and Twenty-sixth Amendments. These amendments must be read as particular exceptions to an otherwise plenary State power to regulate suffrage and the process of voting.

The Warren Court departed from 100 years of precedent in 1964 in *Reynolds v. Sims*, in ruling that the Fourteenth Amendment's "equal protection clause" included the "one man, one vote" principle. Even so, the line of cases culminating in *Reynolds v. Simms* was always with respect to *legislative representation*; either in Congress or in state legislatures. Over and over in *Reynolds* the majority opinion emphasized that "equal protection" was in elections for representatives: "With

respect to the allocation of *legislative* representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." The *Reynolds* line of cases repeatedly speaks only of "*legislative apportionment*."

The Warren Court decreed that each citizen's share in making laws through representation should be approximately equal. Since electors do not "make law" and are not "legislative" in any way, the "one-man, one-vote" principle does not even seem to apply to choosing electors.

In fact, *Reynolds* explicitly said that there was a great difference between the selection of presidential electors and elected representatives: "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite." Thus in *Reynolds* the Court explicitly suggested that the "one-man, one-vote" principle which applies in legislative representation does not apply with respect to the choosing of electors.

We also agree with dissenting opinion of Justice Harlan that:

> Since it can, I think, be shown beyond doubt that state *legislative* apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const., Art. IV, 4), the Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.

The *Reynolds* line of cases was the result of an activist period of the Warren Court, which runs afoul of the current court's tendency towards strict construction and respect for federalism. This Court might well take this opportunity for overturning *Reynolds*, but it would be a shocking reversal of the Court's recent jurisprudence, to actually expand the "equal protection" argument to the selection process for presidential electors when it had previously been applied only to legislative apportionment.

In conclusion then we repeat, since Article 2 section 1 grants full power to legislatures to determine the method of choosing electors, and since neither Art 1 section 4, nor the Fourteenth Amendment result in any diminution of that authority, there remains no federal right to vote in presidential elections. Although this point is commonly misunderstood, one would have hoped that such a distinguished and important body as the Florida Supreme Court would have recognized this fact, but since they appear to have missed or ignored it, it may be a proper exercise of this court's review function to remind that court and the American people of that fact.

II. The Florida Supreme Court was in error when it ruled that the Uniformed and Overseas Citizens Absentee Voting Act superceded State law.

The Florida Supreme Court decision relied heavily upon the Uniformed and Overseas Citizens Absentee Voting Act (Pub. L. 99-413), in its decision that the 7 day deadline required by Florida statute could not be executed:

> Chapter 101 provides that all votes, including absentee ballots, must be received by the Supervisor no later than 7 pm on the day of the elections. Section 101.68(2)(d) expressly states that "[t]he votes on absentee ballots shall be included in the total of the county." Chapter 102 requires that the board submit the returns by 5 p.m. on the seventh day following the election. . . . This, of course, is not possible, because *our state statutory scheme has been superceded by federal law* governing overseas voters (Fl. SC00-2346, p. 28) [emphasis added].

The conflicting section of the Florida Code is 101.67(2) which declares: "All marked absent electors' ballots to be counted must be received by the supervisor by 7 p.m. the day of the election. All ballots received thereafter shall be marked with the time and date of receipt and filed in the supervisor's office."

In short, the Florida Court relied upon its interpretation that the 7 day deadline was, in effect, illegal, because federal law required an extension. We believe, however, that this cannot be the case

since in passing the Uniformed and Overseas Citizens Absentee Voting Act Congress unconstitutionally intruded upon an area of election law reserved to the states. If the Overseas Voting Act, is unconstitutional then it cannot supercede the state law requiring that elections be certified 7 days after election day.

There are two articles of the US Constitution which discuss elections for federal office: article 1 section 4 (regarding Congress) and Article 2 section 1 (regarding president).

> Art 1 sec 4 "The times places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but Congress may at any time by law, make or alter such regulations, except as to the places of choosing senators."
>
> Art 2 sect 1 "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled."

Article 1 does seem to give Congress great leeway over the regulation of congressional elections; Article 2 – governing selection of electors – does not. Congressional enactment requiring acceptance of oversees ballots was passed pursuant to the broad grant of power found in article 1, section 4. However, article 1 section 4 applies only to Congressional elections. Article 2, which governs presidential elections leaves complete authority in the hands of the State legislature.

The District and Appellate Courts in the current controversy, in declining to intervene have both ruled that Article 2 of the US Constitution reserves to State legislatures virtually complete authority over presidential elections.

A. Because Congress exceeded its authority in passing the Uniformed and Overseas Citizens Absentee Voting Act, State law remains controlling with respect to the deadline for filing and certifying absentee ballots.

Although the Florida Secretary of State has agreed to follow the federal demand to count late overseas ballots, the Florida legislature has not approved this. The executive branch has put forward regulations in the Florida Administrative Code (1.S-2.013) to attempt to bring the state into compliance with the federal extension. The governor and Secretary of state have ignored the State law under the theory that federal law preempts the state law. But a federal law preempts state law only if it is constitutional.

In the absence of a valid federal preemption of state law, executive officials must execute the law as provided by the legislature.

Article 6 of the Constitution, says that "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the land; and the judges of every state shall be bound thereby." Obviously, if a Congressional enactment is unconstitutional then it cannot preempt State law.

The certification of the election, is obviously a matter of State law into which this court has no jurisdiction to intervene. It is, however, within the proper role of the this Court to declare that the Overseas Voting Act does not supercede or preempt State law, and remand to the Florida Courts for reconsideration based on this fact.

In fact, because the Florida decision is based largely on this apparent conflict between State and federal law, it is particularly appropriate for this court to address that apparent

conflict. State courts are obviously reluctant to declare federal provisions unconstitutional, leaving such responsibility up to this court upon review.

Respectfully submitted,

Kenneth B. Clark, *Counsel of Record*

November 27, 2000

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No. 00-836

In The

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Florida

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. As a nonpartisan organization, the ACLU has never in its eighty year history taken a partisan position on any electoral contest and takes no such position on this presidential election. The ACLU has, however, frequently defended the right to full and fair participation in the electoral process because we recognize, as this Court has recognized, that the right to vote is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Indeed, as this Court has stated, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The fact that both sides in this dispute claim to be acting in furtherance of the right to vote and in support of fair electoral procedures is hardly unusual. But it is equally routine in our system of government for such disputes to be resolved through the judicial process. Because this case calls into question the propriety of that traditional judicial function, it raises issues of profound

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

importance. In our view, the resolution of those issues is likely to have an enduring impact on the electoral process even beyond the obviously enormous stakes of the current presidential contest. In particular, we are concerned that the theory of judicial review put forth by petitioner will unduly impair the ability of courts, both state and federal, to use their equitable powers in voting rights cases to craft effective remedies designed to preserve both the right to vote and the right to have one's vote counted. For that reason, the ACLU respectfully submits this *amicus* brief.

STATEMENT OF THE CASE

By this point, the facts of this case are well known to virtually everyone in the country and need not be repeated here at great length. On Tuesday, November 21st, the Florida Supreme Court ruled in a unanimous opinion that Florida's Secretary of State had erred, as a matter of state law, in categorically refusing to accept the results of any manual recounts submitted to her after the November 14th deadline that she had previously announced for the submission of all final vote tallies. *Palm Beach County Canvassing Board v. Harris*, Pet. App. 1a-38a.

The court noted in its opinion that Florida law created a conflicting set of statutory mandates. On the one hand, Fla. Stat. § 102.111 provides that any county returns that are not received by the Department of State by 5 p.m. on the seventh day following either a state or federal

election "shall be ignored."[2] On the other hand, Fla. Stat. § 102.112 also addresses the question of what to do if county returns are not received by the Department of State by 5 p.m. on the seventh day after the election but, in contrast to the mandatory language of § 102.111, states that "such returns *may* be ignored and the results on file at that time *may* be certified by the department." (Emphasis added.) The permissive nature of this sanction is underscored by the following subsection of § 102.112, which directs the Department of State to fine each county canvassing board member $200 "for each day such returns are late, the fine to be paid only from the board

[2] Subsection 1 of the statute reads in its entirety, as follows:

> (1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the results of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. If the County returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored and results shown by the returns on file shall be certified.

member's personal funds."[3] As the court below noted, that clock would never tick if late filings were subject to automatic rejection under § 102.111. Pet. App. 25a.

Adding to the confusion, Florida law provides that any candidate may submit a written request to the county canvassing board for a manual recount at any time "prior to the time the canvassing board certifies the results for the office being protested. . . . " Fla. Stat. § 102.166. Upon receiving such a request, a county canvassing board "may" authorize a sample recount by hand. The sample must include at least three precincts and one percent of the total votes cast for the candidate requesting the recount. If the result of the sample recount "indicates an error in the vote tabulation which could affect the outcome of the election," Fla. Stat. § 102.166(4)(b), the canvassing board is required to address the error in any one

---

[3] Section 102.112 provides, in its relevant subsections, as follows:

> (1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. on the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.
>
> (2) The department shall fine each board member $200 for each day such returns are late, the fine to be paid only from the board member's personal funds . . .

of three ways, including a full manual recount, Fla. Stat. § 102.166(5)(c). Section 102.166 does not, on its face, indicate when the manual recount must be finished. It is fair to assume, however, that the Legislature understood that manual recounts take time, as the facts of this case undeniably demonstrate.

Faced with this tangled web of conflicting laws, the Florida Supreme Court applied a series of well-established rules of statutory construction "in an effort to determine legislative intent." *Id.* at 24a. First, it held that a more specific statute takes precedence over a more general one. *Id.* In this case, the court concluded, that meant that the inflexible seven day deadline of § 102.111 had to give way to the more flexible procedures of § 102.112, which authorize the Department of State to fine county canvassing board members for filing late returns rather than rejecting the late returns themselves. Second, the court noted that a later statute generally takes precedence over an earlier one. *Id.* Here, § 102.111 was enacted in 1951 and § 102.112 was enacted in 1989. Third, the court ruled that enforcing the inflexible seven day deadline of § 102.111 would render it impossible ever to impose the daily fine for late returns that § 102.112 expressly contemplates, in violation of the interpretive canon that every provision of a statute must be assumed to have meaning and be given effect. *Id.* at 25a. Fourth, the court observed that strict adherence to the seven day deadline of § 102.111 would, in many instances, make it impossible to complete the manual recount that § 102.166 explicitly authorizes, in violation of the rule that related statutory provisions should be read harmoniously, whenever possible. *Id.* at 25a-26a. Finally, the court reiterated

its longstanding view that election laws should be "liberally construed in favor of the citizens' right to vote," given Florida's deep constitutional commitment to protecting the right of suffrage. *Id.* at 30a.

Because each of these traditional rules of statutory construction pointed in the same direction, the court determined that it could best effectuate the legislative intent expressed through these varied and apparently inconsistent provisions by extending the deadline for submitting the results of manual recounts until 5 p.m. on Sunday, November 26th.[4] *Id.* at 38a. In so doing, the court concluded, it would simultaneously respect the Legislature's recognition that a manual recount can help assure an accurate vote tally, guarantee that the manual recounts will not drag on indefinitely, allow adequate time for the post-certification contests that Florida law allows, and preserve the state's overriding interest in certifying its presidential electors by the federal deadline of December 12th.

The Florida Supreme Court is, of course, the ultimate arbiter of Florida state law. The question of whether it correctly interpreted what the Legislature intended is therefore not before this Court. Instead, what this Court must now decide is whether the decision below so fundamentally altered the rules of the election after it was held

[4] Within hours of this court-imposed deadline, the Florida Secretary of State declared Governor Bush the winner of Florida's presidential election by 537 votes. That certification is being contested by Vice President Gore in the Florida state courts.

that the decision cannot be sustained as a matter of federal law.

SUMMARY OF ARGUMENT

As a matter of principle, the ACLU wholeheartedly agrees with petitioner's assertion that the rules governing an election should be established before an election is held. That principle is embodied in basic notions of due process. And, in the case of presidential elections, it is codified in the provisions of 3 U.S.C. § 5, which was enacted by Congress in 1887 following the disputed election of Rutherford B. Hayes eleven years earlier. But, unlike petitioner, we do not believe that the rather standard exercise of statutory interpretation engaged in by the court below can or should be characterized in such apocalyptic terms.

Petitioner's assertion that the Florida Supreme Court usurped the constitutional authority of the state Legislature to direct the manner in which presidential electors shall be chosen ignores the fact that the Florida Legislature exercised that authority in this case by imposing a set of conflicting instructions. Presented with that conflict, the Florida Supreme Court did what courts in this country do every day: it attempted to reconcile the Legislature's conflicting instructions by applying neutral canons of statutory construction. Whether one agrees or disagrees with its result, that judicial undertaking cannot be regarded as a usurpation of the legislative role without calling into question every act of statutory construction. Trying to discern what the Legislature meant when it

crafted an ambiguous set of rules for choosing presidential electors is not the same as supplanting the Legislature in its constitutionally appointed task. Petitioner's claim that the decision below conflicts with the constitutional allocation of power set forth in Article II, Section 1, Clause 2, is therefore without merit.

Likewise, petitioner's contention that the decision below violates due process, in general, or 3 U.S.C. § 5, in particular, cannot withstand scrutiny. Petitioner repeatedly invokes 3 U.S.C. § 5 for the proposition that the selection of presidential electors must be based on law "enacted prior to" election day. As noted above, we do not quarrel with that proposition in the abstract. It is not, however, what the statute actually provides. Read in its entirety, 3 U.S.C. § 5 addresses the process for resolving "any controversy or contest concerning the appointment" of presidential electors. Based on the language of the statute, it is the state's dispute resolution process, "by judicial or other methods or procedures," that must be in place before the election is held, and that must be completed six days before the electors will meet to choose the next president. Florida's decision to commit electoral disputes to the courts for judicial resolution was in place long before this election was held, and it is difficult to see how following that established process in this case can lead to a violation of 3 U.S.C. § 5.

Petitioner's argument also mischaracterizes the process of judicial interpretation. Whatever 3 U.S.C. § 5 does or does not require – and like everyone else, we recognize that we are dealing with a statute that has rarely been cited, much less authoritatively construed – we readily acknowledge that due process places some constraints on

the ability of either the legislative or judicial branches to apply new substantive rules to an election that has already been completed. A court that resolves the ambiguity in preexisting rules, however, is engaged in a very different enterprise. As this Court has explained, "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (footnote omitted). The decision below undeniably construed Florida's existing election code but, contrary to petitioner's view, that is not the equivalent of creating a new code from whole cloth.

Finally, it is important to note that Florida is not the only state in the nation with an ambiguous election code nor has this been the only closely contested election in our nation's history. The combination of those two facts frequently places courts in the position of refereeing election disputes in an effort to determine the will of the voters. Properly understood, that process is not an impediment to fair elections, it is a guarantee of them. Yet, courts cannot be expected to perform that role if they are stripped of the tools they have traditionally employed to discern legislative intent and then enforce that intent through appropriate remedies. Other than being in the glare of a presidential election, what the Florida Supreme Court did in this case is not that unusual. If that decision-making process is now called into question, the role of the courts as a guardian of voting rights is likely to diminish.

ARGUMENT

I. THE DECISION BELOW INTERPRETING FLORIDA'S ELECTION LAW DOES NOT IMPROPERLY USURP THE POWER OF THE LEGISLATURE TO DETERMINE THE MANNER IN WHICH THE STATE SELECTS ITS PRESIDENTIAL ELECTORS

Article II of the Constitution undeniably assigns to each state legislature the power to determine the manner in which its presidential electors will be selected.[5] It is equally undeniable that the Florida Legislature has exercised that constitutionally assigned power by enacting a comprehensive election code that includes, among other things, a mechanism for judicial review of election protests (before certification of the election results) and election contests (after certification of the election results).[6] Pursuant to that legislative grant of authority, the Florida Supreme Court has now determined that the provisions of the election code at issue in this case are neither clear nor internally consistent. This Court is bound by that state court judgment, which involves a pure matter of state law. *See, e.g., Cox v. New Hampshire*, 312 U.S. 569 (1941). By endeavoring to resolve the conflicts in state

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[5] Specifically, Article II, Section 1, Clause 2 provides, in full:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[6] The relevant provisions of the election code are codified in Fla. Stat. § 97-106, and described in the decision below.

law, the Florida Supreme Court was not usurping the legislature's role; it was, instead, attempting to reconcile the various expressions of legislative intent in a way that respected both the will of the Legislature and the will of the voters. It would be an odd conclusion, indeed, to hold that the Florida Supreme Court was constitutionally compelled to leave Florida's election law in the muddle it found it. We do not believe that the language of Article II, Section 1, Clause 2 should be read to produce such an awkward result.

The decision by the framers to allow each state legislature to determine the method of selecting its presidential electors was a compromise, like so many other decisions at the Philadelphia Convention. But the competing positions had little to do with the respective roles of the legislative and judicial branches within a given state. Instead, the focus of the debate, typically enough, was on whether the new national government should set uniform standards for the election of its chief executive officer and, if so, what those standards should be. Thus, the Convention considered and rejected proposals to have the president elected by "the citizens of the United States," by the "people," by "electors to be chosen by the people of the several states," or by "electors appointed for that purpose by the legislatures of the states." *McPherson v. Blacker*, 146 U.S. 1, 28 (1892).

The dispute was described by James Wilson as one that "has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide." 2 M. Farrand, *The Records of the Federal Constitutional Convention* 501 (New

Haven: rev. ed. 1937). In the end, of course, the Convention chose to give each state latitude to choose its electors as it saw fit and, at least in the early days of the Republic, that latitude produced a variety of different electoral schemes. *See McPherson v. Blacker,* 146 U.S. at 29-34.

Although the power given to the states in this regard has often been described as plenary, it is not absolute. As this Court explained in *Williams v. Rhodes,* 393 U.S. 23, 29 (1968), "the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution." For example, states may not choose a scheme for selecting presidential electors that discriminates against third party candidates, *Williams v. Rhodes, supra; Anderson v. Celebrezze,* 460 U.S. 780, 795 n.18 (1983), or that attempts to dictate whom the parties must seat as delegates to their nominating conventions. *Democratic Party v. LaFollette,* 450 U.S. 107, 126 (1981); *Cousins v. Wigoda,* 419 U.S. 477, 495 (1975).

Were we writing on a clean slate, we would urge this Court to hold that the right of the judiciary to decide what its state election laws mean and how they should be applied in particular circumstances is another important limitation on the otherwise unfettered power of the state legislature to choose a method for selecting presidential electors. In the classic words of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803):

> It is emphatically the duty and province of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts much decide on the operation of each.

However, it is not necessary for the Court to go that far in this case because the Florida Legislature has already invited the judiciary into the process by authorizing the courts to resolve electoral disputes that arise both before and after certification. Surely, there is no reason to believe that the Florida Legislature intended the courts to resolve those disputes without first determining the meaning of the law that the courts have been asked to apply, including which law controls if two or more laws are in conflict. At the very least, it would be wrong to presume such a design on the part of the Legislature without a clear statement of its intent (which would then have to be tested against constitutional norms) to dramatically curtail the traditional prerogatives of a coordinate branch of the state government. *Cf. Webster v. Doe,* 486 U.S. 592, 603 (1988) ("where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear").[7] Absent such a clear statement, the decision by the Florida Supreme Court to exercise its traditional powers of statutory construction pursuant to a specific jurisdictional grant of authority by the Florida

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[7] The fact that the current Legislature apparently disagrees with the particular decision of the Florida Supreme Court that is now under review is legally irrelevant. Were the rule otherwise, a legislative body could always respond to disappointing decisions by retroactively stripping the courts of jurisdiction to hear the dispute. *See Plaut v. Spendthrift Farms,* 514 U.S. 211 (1995) (legislature may not interfere with final court judgments).

Legislature to resolve election disputes cannot plausibly be construed as a usurpation of the legislative role. Suppose, for example, that the Florida Legislature had enacted two statutes. One provided that the counties had to submit their vote tallies to the state within seven days in all statewide elections. The other provided that the counties had ten days to submit their vote tallies to the state in presidential elections. If a challenge was brought to the vote tally submitted in a presidential election by a Florida county on the eighth day, it is absurd to suggest that the courts would be barred from deciding which statute takes precedence, especially if the court reached that result by applying well-established rules of statutory construction.

That is all that the Florida Supreme Court has done in this case. It did so, moreover, in a carefully crafted decision that began and ended its legal discussion with a reference to legislative intent as the guiding "polestar." This Court engages in a similar exercise on a routine basis when it fills in the interstices of federal law by deciding, for example, whether Congress intended to create an implied right of action, *see Cort v. Ash*, 422 U.S. 66 (1975), or when it interprets the appropriate scope of an ambiguous federal statute. *E.g., Bailey v. United States*, 516 U.S. 137 (1995) (holding that federal statute imposing additional penalties for "use" of a firearm during drug offense requires more than evidence of simple possession).

In short, the Florida Supreme Court did not substitute its judgment for the judgment of the Legislature; it did its best to divine what the Legislature intended when it enacted each of the provisions of this complex election code. Nothing in Article II, Section 1, Clause 2 renders

that undertaking illegitimate. To the contrary, by giving force and effect to the Legislature's intent as authoritatively construed by the Florida Supreme Court, the decision below does far more to promote the constitutional scheme of selecting presidential electors than to undermine it.

II. THE DECISION BELOW DID NOT CREATE THE SORT OF NEW RULE THAT CANNOT BE IMPOSED ONCE THE ELECTION IS OVER

Petitioner's second argument, as we understand it from the petition for *certiorari*, proceeds as follows. Even if the decision below did not usurp the legislature's constitutionally assigned function of choosing the method for selecting presidential electors, the act of statutory interpretation engaged in by the Florida Supreme Court nonetheless announced a new rule for manual recounts that was then applied to a completed election in violation of 3 U.S.C. § 5 and, perhaps, due process as well.

In support of this claim, petitioner repeatedly highlights a portion of 3 U.S.C. § 5 that refers to "laws enacted prior to the day fixed for the appointment of the electors," which federal law sets as Election Day. *See* 3 U.S.C. § 1 (designating Election Day as the "time of appointing electors"). Read in its entirety, however, 3 U.S.C. § 5 has less to do with setting the rules for the election than with establishing in advance a procedure for resolving election disputes. To begin with, the section is entitled: "Determination of controversy as to appointment of electors."

And, while a statute's title is not dispositive of its meaning, the text in this case in fact mirrors the title. It provides:

> If any state shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, *by judicial or other methods or procedures*, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

(Emphasis added.)

As previously described, Florida had in place before Election Day a procedure for resolving election controversies that might arise after Election Day. That procedure contemplated exactly what took place here – namely, the filing of election challenges in the appropriate state court with an ultimate appeal to the Florida Supreme Court. To the best of our knowledge, that procedure was not altered in any way, either in this case or in any of the other myriad challenges that were filed. Indeed, if 3 U.S.C. § 5 has any relevance at all, it appears on its face to foreclose petitioner's claim rather than support it since the statute indicates that any election dispute that is resolved by the state courts pursuant to

pre-existing procedures at least six days prior to the date that the Electoral College is scheduled to meet on December 18th "shall be conclusive."

More fundamentally, the notion that courts create new rules when they attempt to harmonize existing statutory provisions, as the Florida Supreme Court did in this case, or when courts attempt to discern the legislative meaning behind an ambiguous enactment, as the Florida Supreme Court also did in this case, misconstrues the nature of the judicial process. The Court addressed this issue directly in *Rivers v. Roadway Express*, 511 U.S. 298, when it considered the impact of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, on its earlier decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Relying on the fact that their lawsuit was filed before this Court's decision in *Patterson* was announced, the plaintiffs in *Rivers* had argued that the 1991 Act merely restored the law to what it had been prior to *Patterson* and thus did not raise any retroactivity questions. This Court disagreed. Writing for the majority, Justice Stevens asserted:

> [I]t is not accurate to say that the Court's decision in *Patterson* "changed" the law that previously prevailed in the Sixth Circuit when the case was filed. Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Court of Appeals had misinterpreted the will of the enacting Congress.

Id. at 313 n.12 (emphasis in original). It is because a judicial decision authoritatively construing an existing statute does not make new law that it is presumed to

apply retroactively, *Harper v. Dep't of Taxation*, 509 U.S. 86, 97 (1993). By contrast, a statute enacted by the legislature is presumed to apply prospectively precisely because it does make new law, by definition, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

This would undoubtedly be a more difficult case if the Florida Supreme Court had adopted a new set of election rules untethered to any existing statutory scheme. Under those circumstances, serious questions of First Amendment due process might well arise. *See generally*, Monaghan, "First Amendment 'Due Process,'" 83 Harv.L.Rev. 518 (1970). But the Florida Supreme Court was plainly not acting in a statutory vacuum when it attempted to make sense of the conflicting state laws governing manual recounts and establishing the operative dates for filing certified returns. Like this Court's decision in *Patterson*, the Florida Supreme Court's holding that the more recent and more specific provisions of § 102.112 are controlling did not make new law; it merely clarified what the law had been since § 102.112 was enacted in 1989, even if there had been no prior occasion to say so.

The logical extension of petitioner's argument is that courts could never decide issues of first impression in the context of election disputes. If adopted, that rule would be far more novel than anything the Florida Supreme Court did in this case. Indeed, the fact that this dispute has apparently presented an issue of first impression under Florida law weakens, not strengthens, petitioner's unfairness claim. In *Patterson*, the Court found no cognizable reliance interest despite acknowledging that its interpretation of 42 U.S.C. § 1981 was directly at odds

with the prior holdings of several appellate courts. Those decisions, the Court said, were simply incorrect and entitled to no weight. *Rivers*, 511 U.S. at 313.

If, as we believe, the Florida Supreme Court's decision to give precedence to § 102.112 over § 102.111 did not create a new legal standard in violation of either due process or 3 U.S.C. § 5, then petitioner is reduced to arguing that the court below erred by imposing its own deadline for the filing of an amended certification. It is true that the court's choice of 5 p.m. on Sunday, November 26th, as the final deadline for the filing of amended certifications cannot be found in any pre-existing statute. But the argument that the adoption of a judicially imposed deadline was therefore improper as a *post hoc* rule is unpersuasive for at least two reasons.

First, the failure to adopt a filing deadline for amended certifications under § 102.112 would have jeopardized the ability to carry out the post-certification contests that the Legislature clearly contemplated within the time set by federal law for designating the state's presidential electors. The November 26th deadline set by the court was thus part and parcel of its effort to reconcile the conflicting mandates imposed by the Legislature, and to determine how best to effectuate legislative intent under the unique and daunting circumstances of the present controversy.

Second, the role of the legislature is to determine the rules of the electoral contest. The role of the courts is to fashion an appropriate remedy once those rules are violated. Here, the Florida Supreme Court determined that the rules of the electoral contest established by the Florida

Legislature permitted manual recounts. Having reached that judgment, it acted well within its equitable discretion in permitting a window of opportunity to allow those recounts to go forward in an effort to achieve a more accurate assessment of the will of the voters. As detailed below, the exercise of that equitable discretion is critical to the ability of courts to serve as impartial referees in electoral contests around the country and, by performing that function, to preserve the right of every citizen to full and fair participation in the electoral process.

III. COURTS HAVE BROAD EQUITABLE POWERS IN RESOLVING ELECTION DISPUTES

Courts have traditionally exercised broad equitable powers in resolving election disputes to insure that the election process proceeds in a timely and reliable manner, and that voters are not disfranchised. The right to vote is fundamental. For that reason the equitable and remedial powers of a court are particularly broad in this area of the law. A ruling that the Florida state court lacked power in the exercise of its remedial authority to resolve conflicting provisions of state law, or to provide for contingencies not expressly anticipated or foreseen by state law, would lead to inequitable results, would needlessly disfranchise thousands of state voters, and would be contrary to the long established practice of the courts in voting rights cases.[8]

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[8] Aside from whether the Florida Supreme Court acted in conformity with 3 U.S.C. § 5, there can be no serious contention that the court abused the exercise of its equitable powers on other grounds.

A. The Right to Vote In a Fair and Reliable Election and to Have One's Vote Counted Are Constitutionally Protected

As the Florida courts have recognized, "federal and state constitutions guarantee the right of the people to take an active part in the . . . election process." *Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975). *See also In Re: The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida*, 707 So.2d 1170, 1173 (Fla. 3d D.C.A. 1998) ("the right to vote . . . is assured every citizen by the United States Constitution"), *rev. den'd*, 725 So.2d 1108 (Fla. 1998). The right to vote is entitled to special constitutional protection because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights." *Reynolds v. Sims*, 377 U.S. at 562.

The constitutionally protected right to vote is not limited to the simple act of putting a ballot in a box. In *United States v. Classic*, 313 U.S. 299, 315 (1941), the Court held that "included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted." *Accord*, *Reynolds v. Sims*, 377 U.S. at 554 ("[i]t has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted") (citations omitted). In order to safeguard the right of voters to have their votes counted, the Court has held that ballots may not be destroyed or adulterated, *United States v. Classic*, 313 U.S. at 299, diluted by stuffing the ballot box, *Ex parte Siebold*, 100 U.S. 371 (1880), *United States v. Saylor*, 322 U.S. 385 (1944), diluted or debased through use of white primaries or white private political

clubs, *Smith v. Allwright*, 321 U.S. 649 (1944), *Terry v. Adams*, 345 U.S. 461 (1953), nor diluted through the use of a "blanket" primary, *California Democratic Party v. Jones*, 120 S.Ct. 2402, 2412 (2000) (the state scheme "adulterate[d]" a political party's candidate selection process "by opening it up to persons wholly unaffiliated with the party").

It would be a complete anomaly to hold that the protections of the state and federal constitutions did not apply to the most important elections conducted in the United States, those for the president. The legitimacy of elected office, including the presidency, and indeed the democratic system itself, depends upon the reliability of the electoral process.

B. A Court of Equity Has the Power and Duty to Grant Relief

As this Court has long noted, "there is inherent in the courts of equity a jurisdiction to . . . give effect to the policy of the Legislature." *Clark v. Smith* [38 U.S. 195], 13 Pet. 195, 203 (1839). *See also Mitchell v. De Mario Jewelry*, 361 U.S. 288, 292 (1960) (noting "the historic power of equity to provide complete relief in light of the statutory purposes").

Because of the overriding importance of equal voting rights, the remedial powers of the courts are particularly broad in cases involving the exercise of the franchise. The courts have, for example, enjoined and set aside the results of elections held in violation of the law, *Hamer v. Campbell*, 358 F.2d 215, 221 (5th Cir. 1966) (emphasizing "the broad equitable powers of the District Court to

mould relief"), *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) ("[i]f affirmative relief is essential, the Court has the power and should employ it"), ordered new elections, *Hadnott v. Amos*, 394 U.S. 358, 367 (1969), enjoined prosecutions, *United States v. Wood*, 295 F.2d 772, 785 (5th Cir. 1961), frozen voter qualifications, *United States v. Duke*, 332 F.2d 759, 769 (5th Cir. 1964), ordered excluded minorities placed on the registration rolls, *Alabama v. United States*, 304 F.2d 583, 591 (5th Cir. 1961) ("[t]he aim of equity is to adopt judicial power to the needs of the situation"), and issued injunctions against economic coercion and intimidation of voters, *United States v. Beaty*, 288 F.2d 653, 657 (6th Cir. 1961).

Courts have also routinely exercised their equitable powers in fashioning remedies for voting rights violations in the absence of any, let alone conflicting, state law remedy provisions. In *Emery v. Hunt*, CIV 00-3008 (D.S.D. 2000), for example, plaintiffs challenged a 1996 redistricting plan for the South Dakota house of representatives on the grounds that it violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and that it had been enacted in violation of the state constitution which prohibited interstitial redistricting. The federal court certified the state law issue to the state supreme court which ruled on July 26, 2000 – several weeks *after* the June primary – that the 1996 plan had been enacted in violation of the state constitution and that the only lawful plan under state law was the plan first enacted after the census in 1991. *See In the Matter of the Certification of a Question of Law from the United States District Court*, 2000 SD 97. There was, however, no state law providing for a remedy where a primary had been held under a plan later found by a court

to be unconstitutional.[9] The absence of a state law remedy is hardly surprising since the legislature could not have reasonably foreseen that it would adopt a plan that violated the state constitution. The district court, after considering various proposals submitted by the parties, and despite the absence of state law providing for such a remedy, ordered that a new primary election be held in September prior to the November general election. *See Emery v. Hunt*, Order of August 10, 2000, a copy of which is included in the appendix to the brief at 1a. Any contention that the district court in *Emery* lacked inherent power to fashion a remedy under the particular facts of that case would be wholly inconsistent with this Court's repeated admonitions that courts must insure that elections go forward in a "timely fashion" and that voters have a fair opportunity to elect a governing body that properly represents them. *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (quoting *Reynolds v. Sims*, 377 U.S. at 586); *Connor v. Finch*, 431 U.S. 407, 426 (1977). State courts are no less obligated to fashion remedies, as the Florida court did here, that provide voters the fair opportunity to choose their elected officials.

Alden v. Board of Commissioners of Rosebud County, Montana, CV 99-148-BLG-DWM (D.Mont. 2000), is another example of a court's filling in the spaces or gaps in state law to remedy a violation of the law in order to allow elections to proceed in a timely manner. Shortly before the scheduled 2000 primary for the Rosebud

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[9] State law provided a method for filling vacancies following a primary election only where the vacancy occurred "by reason of death or withdrawal." SDCL 12-6-56.

County Commission, the district court found that the existing at-large system of elections violated Section 2 of the Voting Rights Act. Since there were fewer than 75 days between the date of the court order and the scheduled primary, the court concluded that a primary under a new plan could not be held in conformity with state law. Accordingly, it enjoined the primary and directed that a special general election be held in November 2000. Political parties were allowed to nominate candidates and independents were allowed to file petitions for a place on the ballot. *Alden v. Board of Commissioners of Rosebud County, Montana*, Order of May 10, 2000, a copy of which is included in the appendix at 8a. As in *Emery*, the district court in *Alden* acted in light of clearly established equitable principles in fashioning a remedy to allow the election to proceed in an orderly manner so that voters would have a fair opportunity to elect officials that properly represented them.

The Florida Supreme Court, in resolving the conflicts in state statutory law and setting a deadline for acceptance of amended certifications by the Secretary of State and the Elections Canvassing Commission, was acting in light of well recognized principles of equity. To conclude that the court acted beyond its powers would result in the disfranchisement of voters whose votes were not counted by the voting machines and render the court impotent in remedying election disputes. Nothing in federal or state law should countenance such an implausible result or be deemed to preclude the judicial branch from crafting appropriate, narrowly tailored remedies to safeguard the

right to vote, even (and perhaps most especially) in a presidential contest.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the decision below should be affirmed.

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STEVEN C. EMERY, ROCKY LE COMPTE, and JAMES PICOTTE, Plaintiffs, -vs- ROGER HUNT, in his official capacity as Speaker of the South Dakota House of Representatives, et al., Defendants.	*	CIV 00-3008 ORDER
UNITED STATES OF AMERICA, Plaintiff, -vs- STATE OF SOUTH DAKOTA, WILLIAM J. JANKLOW, in his official capacity as Governor of the State of South Dakota, et al., Defendants.	*	CIV 00-3015 (Filed Aug. 10, 2000)

The United States of America and certain individual plaintiffs filed actions in this court, challenging the action of the South Dakota Legislature in 1996 which action abolished Legislative Districts 28A and 28B. The Court ordered these two cases consolidated. Plaintiffs sought to enforce the Voting Rights Act of 1965, 42 U.S.C. § 1973,

seeking declaratory and injunctive relief against continued use of the 1996 redistricting plan on the ground that it dilutes the voting strength of Native Americans.

Defendants filed various motions to dismiss, largely on the basis of laches and claimed general equitable principles based upon delay in waiting until 2000 to bring this action to challenge what was done by the South Dakota Legislature in 1996. The defendants further contended that the 1991 redistricting plan was in violation of the United States Constitution so that the 1996 action was required to remedy what was done in 1991. Plaintiffs subsequently sought a preliminary injunction, claiming the 1996 redistricting plan was in violation of Article III, Section 5, of the Constitution of the State of South Dakota. This Court certified the State constitutional question to the South Dakota Supreme Court. On July 26, 2000, acting in a most expeditious and helpful manner, the South Dakota Supreme Court answered the question by determining that the 1996 action of the South Dakota Legislature, which attempted to abolish House Districts 28A and 28B, was in violation of the South Dakota Constitution which allows redistricting only every ten years and at no other time. The legislative action of redistricting in 1996 is therefore a nullity and House Districts 28A and 28B as established in 1991 are the proper House legislative districts in question. *See In the Matter of the Certification of a Question of Law from the United States District Court*, 2000 SD 97. It is now clear that the results of the primary election already conducted in what was claimed to be House District 28 should be vacated and held for naught. The parties argue about what this Court

should now do and the Court has carefully examined all such proposals and objections.

Other motions must first be examined. The various motions to dismiss (Docs. 6, 45, 56, 58, 59, and 87-2) should all be denied. Two motions (Docs. 25 and 27) for a preliminary injunction should be denied as moot. Other motions, including a motion for partial summary judgment (Doc. 54), a motion in limine as to evidence of claimed legislative motives based upon testimony by those involved in the legislative process (Doc. 82) and a motion by the state defendants for a continuance of the trial date (Doc. 87-1) should all be denied as moot. Motions to quash certain subpoenas (Doc. 89 and 93) should be granted. The previous Order (Doc. 79) setting this case for trial should also be vacated since the trial will not be conducted. Finally, the state defendants filed a motion (Doc. 103-3) to dismiss the claims under the Voting Rights Act of 1965 as moot. Such motion should be granted, given the fact that the defendants have now apparently accepted the final decision of the South Dakota Supreme Court and have determined to not seek a rehearing within the twenty day period permitted by SDCL 15-30-4.

The State defendants filed a motion (Doc. 103-1) which motion should be denied as moot, given the fact the State defendants have filed a revised motion (Doc. 105) seeking to have this Court implement the decision of the South Dakota Supreme Court. The State defendants propose two possible alternatives. The first would call for special primary elections in House Districts 28A and 28B. The second would omit the primary elections and order a general election which would allow independents and

any member of a recognized political party, based upon obtaining sufficient signatures on a nominating petition, to run for the office of State Representative on the general election ballot. Under the second proposal, there would be no nominations of party candidates. The candidate in each district obtaining a plurality of votes on November 7, 2000, would be declared elected. Corson and Zieback Counties filed a motion (Doc. 110) which, in effect, urges the Court to adopt the State defendants' second proposal. The motion is captioned, however, in a fashion to suggest that leave of court is sought to join the state defendants' proposal. Leave is not required to allow the two counties to state their position and the motion will be construed as asking the Court to adopt the proposal of the State defendants which would negate the use of a primary election. The motion, in any event, should be denied for reasons which follow.

The United States filed a motion (Doc. 107) seeking to apply SDCL 12-6-56, thus foregoing any primary election and allowing county political committees to select candidates. This statute is not applicable. No vacancy has occurred "by reason of death or withdrawal after a primary election" and the Court should decline to apply the statute. The motion should be denied. Federal courts should encourage selection of candidates for public office by the registered voters in an election. What the United States urges here would undermine the process of selection of candidates in primary elections and return these districts in 2000 to methods used before the George S. McGovern national reforms. The so-called Emery plaintiffs have proposed the same remedy as sought by the United States (Doc. 104) and such proposal should also be

rejected for the reasons stated. It is indeed unfortunate that unconstitutional action by the South Dakota Legislature has caused and will cause additional election expenses in the affected counties, up to $6,000 in Corson County alone. It is even more unfortunate that such unconstitutional action has caused and will cause great confusion and inconvenience to the voters in that part of our State. This Court, however, is without power to remedy these problems and expenses, especially when the affected counties have filed no cross claim of any kind against the State. Perhaps the 2001 Legislature will recognize what the State has caused (acting even in opposition to legal advice from the Legislative Research Council) as to county expenses and reimburse the affected counties for these expenses. The Legislature may also find, of course, that these same counties were asking the Legislature to do exactly what was done in 1996 and "made their own bed."

The proposal by the State defendants and some of the counties to only conduct a general election should be rejected. It would, in effect, allow Republicans to select among several Democratic candidates for the same office and Democrats to select among several Republican candidates for the same office, much akin to the open primary system struck down in *California Democratic Party v. Jones*, 120 S.Ct. 2402 (2000). While the cited case is not directly on point, to do what the State alternatively urges would violate the "spirit" of the Supreme Court case. This Court has broad discretion in fashioning remedies in cases such as this. This Court will not permit voters registered in one political party to intervene with the selection of candidates from another party. This Court likewise rejects the

argument that primary elections, if now ordered, would violate the Voting Rights Act.

The Court determines that a portion of the revised motion of the State defendants (Doc. 105-2(a)) should be granted and special primary elections should be ordered with the dates as provided in Exhibit A to Doc. 105, namely the "revised District 28A and 28B special primary election calendar."

Remaining issues include attorney fees and costs to be awarded to plaintiffs. Now, therefore:

IT IS ORDERED:

1. Defendants' motions to dismiss (Docs. 6, 45, 56, 58, 59, and 87-2) are denied as moot.

2. Plaintiffs' motions for a preliminary injunction (Docs. 25 and 27) are denied as moot.

3. Plaintiffs' motion for partial summary judgment (Doc. 54) is denied as moot.

4. Plaintiffs' motion in limine (Doc. 82) is denied as moot.

5. Defendants' motion for a continuance (Doc. 87) is denied as moot.

6. The motion to quash subpoena (Doc. 89) is granted.

7. The motion to quash subpoena duces tecum (Doc. 93) is granted.

8. The previous Order (Doc. 79) setting trial dates is set aside and no trial will be conducted.

9. The motion of the State defendants to dismiss the claims under the Voting Rights Act of 1965 (Doc. 105-3) is granted since any such claims and claimed defenses are moot.

10. The motion of the State defendants (Doc. 103-1 and 103-2) is denied as moot.

11. The motion of the United States (Doc. 107) is denied.

12. The motion of Corson and Ziebach counties (Doc. 110) is denied.

13. The motion of the individual plaintiffs (Doc. 104) is denied.

14. The revised motion of the State defendants (Doc. 105-1 and 105-2 (a)) is granted and special primary elections and other election activities shall be conducted according to Exhibit A attached to this Order.

15. The revised motion of the State defendants (Doc. 105-2(b)) to only conduct a general election is denied.

16. The results of the primary election already conducted in what has been claimed to be District 28 are set aside, vacated and held for naught.

17. The redistricting action taken by the 1996 South Dakota Legislative Session is a nullity and Districts 28A and 28B as established in 1991 are the proper legislative districts as a matter of law.

18. The Court retains jurisdiction to entertain claims for attorney fees and costs.

Dated this 10th day of August, 2000.

BY THE COURT:

/s/ Charles B. Kornmann
CHARLES B. KORNMANN
United States District Judge

ATTEST:

JOSEPH HAAS, CLERK
BY: /s/ Barbara J. Pinkerton
DEPUTY
(SEAL)

EXHIBIT "A"

DISTRICT 28A AND 28B SPECIAL PRIMARY ELECTION

CALENDAR

August 11, 2000	earliest day for primary or independent candidates to circulate ad file nominating petitions. (SDCL 12-6-4.1, 12-7-1.1)
August 21-25, 2000	one notice of voter registration deadline – ARSD 5:02:04:04.
August 21-25, 2000	county auditors must publish one notice of deadline for filing nominating petitions – ARSD 5:02:04:17.
August 28, 2000	last day to file primary election nominating petitioners. (SDCL 12-6-4, 12-9-4)
	deadline for voter registration for the primary election. (SDCL 12-4-5)

August 29, 2000	drawing for position on the ballot for the primary election will be held in the office of the Secretary of State at 9:00 a.m. (SDCL 12-16-8)
August 28-September 1 & September 4-8, 2000	weeks in which county auditors must publish the notice of election – ARSD 5:02:04:16. (SDCL 12-12-1)
September 1, 2000	deadline for primary election ballots to be printed and in the auditors' possession. absentee voting may begin as soon as ballots are available. (SDCL 12-16-1, 12-16-17, 12-19-3)
September 8, 2000	deadline for publication of facsimile ballot. (SDCL 12-16-16)
September 12, 2000	**PRIMARY ELECTION DAY** (SDCL 12-2-1, 12-2-3) Polls are open from 8:00 a.m. to 7:00 p.m. local time.
	Last day for independent candidates to file nominating petitions with the Secretary of State. (SDCL 12-7-1)
September 13, 2000	last day for county canvass of returns. (SDCL 12-20-36)
	certified copies of the official county canvasses must be filed with the Secretary of State immediately following the official canvasses. (SDCL 12-20-38.1)
September 14, 2000	last day for convening the state board of canvassers. (SDCL 12-20-47)

September 15, 2000	last day for filing recount petition – ARSD 5:02:19:05. County auditors shall notify the Secretary of State of a legislative recount. (SDCL 12-21-11, 12-21-11.1, 12-21-12)
September 25, 2000	deadline for recount board of convene.
September 26, 2000	deadline for all general election ballots to be printed and in the auditors' possession. Absentee voting may begin whenever ballots are available. (SDCL 12-16-1, 12-16-17, 12-19-3)
October 10, 2000	deadline for special primary legislative candidates to file reports of receipts and expenditures with Secretary of State. (SDCL 12-25-13.3)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CHARLENE ALDEN, FRED BELLY MULE, HOLDA ROUNDSTONE, DANNY SIOUX, WILBUR SPANG, JAMES WALKS ALONG, PHILLIP WHITEMAN, JR., FLORENCE WHITEMAN, and LYNETTE TWO BULLS, Plaintiffs, vs. BOARD OF COUNTY COMMISSIONERS OF ROSEBUD COUNTY, MONTANA; GARY D. FJELSTAD, JOAN K. STAHL, and DANIEL D. WATSON, in their official capacities as members of the Board of County Commissioners of Rosebud County; and GERALDINE CUSTER, in her official capacity as Clerk and Recorder of Rosebud County, Montana, Defendants.	CV 99-148-BLG-DWM ORDER (Filed May 15, 2000)

Before the Court are the parties' proposed remedies for Rosebud County's conceded violation of § 2 of the Voting Rights Act, Pub. L. No. 91-285, 84 Stat. 314 (June 22, 1970), *codified at* 42 U.S.C. § 1973.

Redistricting Now vs. Redistricting After 2000 Census

Rosebud County contends that redistricting should be left to the Commissioners duly elected under the system that violates the Act. They argue that the doctrine of laches should prevent Plaintiffs from triggering redistricting before the mandatory redistricting that will follow the 2000 Census.

"A State should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity." *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576 (1997). That opportunity has been given in this case by Rosebud County's participation in it. The duly elected Commissioners are responsible for districting in the County. *See* Mont. Code Ann. §§ 7-4-2101 *et seq.* (1999). They have conceded that redistricting is appropriate. In settlement of the litigation, they agreed to adopt a single-member districting plan for Rosebud County. *See* Stipulation and Order of January 10, 2000.

What the Commissioners have agreed to by stipulating to redistricting is stated in *Thornburgh v. Gingles*, 478 U.S. 30 (1986). These are the "general legal principles relevant to claims that § 2 [of the Voting Rights Act] has been violated through the use of multi-member districts" (*id.* at 52):

> [U]nless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a block voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group. . . . These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a block to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Thornburgh, 478 U.S. at 49-51 (internal citations and footnotes omitted).

These factors are all that plaintiffs must show in order to establish a violation under § 2 of the Voting Rights Act. In *Thornburgh*, the Court's disquisition on the legal standard for showing racially polarized voting was necessary because the defendants contested the plaintiffs' claim that the current district configuration had the effect of diluting the black vote. By contrast, where a party stipulates that there is a reasonable basis for a finding of vote dilution and, jointly with its adversary, requests the Court to enter an order finding such reasonable basis and sanctioning the stipulation, there is no basis for that party to challenge a finding that § 2 is violated. *See id.* at 78-79 (concluding that whether § 2 has been violated is a question of fact reviewed for clear error, not a question of law reviewed de novo).

Therefore, in light of the stipulation and order entered on January 10, 2000, it is an established fact that the Rosebud County Commissioner Districts violate § 2 of the Voting Rights Act. Whether the Court adopts the plan proposed by the Rosebud County Commissioners or Plaintiffs' plan, or crafts a remedy of its own, it will "dispose[] of [the Commissioners'] claim not in the forbidden sense of cutting [them] off from a remedy to which [they are] entitled, but only in the legitimate sense of granting [them] an element of the very relief [they] sought." *Lawyer*, 521 U.S. at 579.

Thus, the only question before the court is the appropriate remedy, or more precisely, whether a remedy is due. The Commissioners argue that "It is clear that the defense of laches is available in this case, and, while defendants are not seeking to bar the plaintiffs' action, the equities underlying that defense should properly be

considered in conjunction with the remedies that the parties are proposing." This suggestion, that the doctrine of laches should apply not to bar Plaintiffs' action but only to bar their remedy, is legally unintelligible. If the principles of waiver and estoppel apply at all in this case, they preclude assertion of the defense of laches at this late stage of the litigation. The Commissioners agreed to proceed to the remedy stage, they agreed that single-member districts were the remedy, and no party dissented from settlement. These facts distinguish their case from those they cite, *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), *MacGovern v. Connoly*, 637 F.Supp. 111 (D. Mass. 1986), and *Fouts v. Harris*, No. 98-10031-Civ-Paine (S.D. Fla. 1999). The Commissioners had the opportunity to assert this defense or simply refuse to enter into any stipulations before the remedy stage. They chose not to do so.

Against this reasoning, the court should weigh the imperative that § 2 violations must receive a "full and complete remedy." "[A]ny illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury." *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984).

The Commissioners ask the Court to leave in place a system they agree is unfair for fear that change would be even worse. This possibility would be carefully considered by the Court, but the Commissioners have not produced any facts to indicate that the 1990 census is so inadequate that a remedy based on it is doomed to failure. Moreover, Mont. Code Ann. § 7-4-2102(1) compels the Commissioners to redraw district boundaries in light

of the 2000 census. Any remedy the Court imposes will be of brief duration.

Essentially, the Commissioners' stipulation puts the Court in the awkward position of either participating in the perpetuation of an unfair voting system or enforcing a tight schedule and perhaps certain unanticipated expenses to the County by requiring redistricting now. If the Commission is permitted to redistrict only after the results of the 2000 census are available, one commissioner will be forced to accept a two-year term, in direct contravention of Mont. Code Ann. § 7-4-2102(1) (1999).[1] The legal alternative is the better one.

Consequently, I will not accept the Commissioners' plan to postpone redistricting until the results of the 2000 Census trigger Montana's mandatory redistricting statute.

The Remedy

Plaintiffs submit two plans, A and B, both of which reduce the current 16.45% population differential between districts below 10%. Plan A yields a maximum differential of 8.68%, Plan B, 5.57%. The configurations

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[1] For the 2000 election of a commissioner from District 3, the Commissioners propose to keep in place the current at-large system. Then, in 2001, a new single-member districting plan will be forged. In 2002, commissioners from both District 2 (encompassing the Northern Cheyenne Reservation) and district 3 will be elected. The six-year commissioner terms would then be 're-staggered' by holding another election in District 2 in 2004.

under both plans are unremarkable; gerrymandering is not an issue.

Plaintiffs' proposal need not affect the term of any currently sitting Commissioner, because Joan Stahl's term expires in 2000 and that is the year the single-member redistricting plan would take place. Furthermore, redistricting, even shortly before mandatory redistricting, is permitted by Mont. Code Ann. § 7-4-2102(1) (1999): "In every county of the state, following each federal decennial census, the board of county commissioners shall divide their respective counties into three commissioner districts, as compact and equal in population and area as possible. Such apportionment may take place *at any time* for the purpose of equalizing in population and area such commissioner districts."

The commissioner elected in 2000 will participate in redistricting Rosebud County based on the 2000 census. Plaintiffs' proposal ensures that the commissioner will be elected under a fairer system than is currently in place. For these reasons, I will redistrict Rosebud County to implement the boundaries drawn in Plaintiffs' Plan B. However, unlike Plaintiffs' Plan B, the district encompassing the city of Colstrip shall be District 2, and the district encompassing the Northern Cheyenne Reservation shall be District 3.

In order to minimize disruption of Rosebud County's election administration, implementation of Plaintiffs' Plan B will proceed, in part, as if a vacancy existed in the new District 3. Because this order predates the primary election by less than 75 days, the primary election for District 3 Commissioner shall not be held. *See* Mont. Code

Ann. § 7-4-2106(3)(b) (1999). Instead, each political party shall nominate one candidate for the general election. Independents may file petitions with the County Clerk and Recorder on or before the 75th day prior to the general election. A new District 3 Commissioner shall then be elected at the general election on November 7, 2000. However, the current Commissioners shall not appoint anyone to fill the vacancy in the interim between the creation of the district and the general election, and current District 3 Commissioner Joan Stahl shall fulfill her term of office.

Accordingly, IT IS HEREBY ORDERED that, for a period of ten (10) days from the date of this Order, the parties shall have the opportunity to object to the implementation of this remedy. The remedy itself is not subject to objections or motions for reconsideration.

IT IS FURTHER ORDERED that, within twenty (20) days of the date of this Order, a certificate shall be prepared to reflect Plaintiffs' Plan B, except that Plaintiffs' District 2 shall be District 3, and Plaintiffs' District 3 shall be District 2. The certificate shali be dated and signed by the Honorable Gary Day, District Court Judge for the Sixteenth Judicial District, Rosebud County. The certificate shall then be filed in the Office of the Rosebud County Clerk and Recorder. *See* Mont. Code Ann. § 7-4-2103 (1999).

IT IS FURTHER ORDERED that, upon filing of the certificate, the Rosebud County Clerk and Recorder shall cancel the primary election for District 3 Commissioner, currently scheduled for June 6, 2000.

IT IS FURTHER ORDERED that this Order shall not affect the term of Joan Stahl, Commissioner for the current District 3, and that Stahl's term shall expire at the time it would have expired under the old districting plan.

IT IS FURTHER ORDERED that Gary Fjelstad, current District 1 Commissioner, shall remain District 1 Commissioner under the new districting plan. His term of office shall expire at the time it would have expired under the old districting plan.

IT IS FURTHER ORDERED that Daniel Watson, current District 2 Commissioner, shall remain District 2 Commissioner under the new districting plan. His term of office shall expire at the time it would have expired under the old districting plan.

IT IS FURTHER ORDERED that mandatory redistricting based on the 2000 Census shall not occur until the District 3 Commissioner elected in November is duly seated.

IT IS FURTHER ORDERED that Defendants' motion for a hearing (dkt # 32) is DENIED. Plaintiffs' motion to suspend candidate filing deadline (dkt # 36) is MOOT.

DATED this 9th day of May, 2000.

4:26 p.m.

/s/ Donald W. Molloy
DONALD W. MOLLOY
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 28 2000
CLERK

No. 00-836

IN THE

Supreme Court of the United States

GEORGE W. BUSH,

Petitioner,

v.

PALM BEACH COUNTY CANVASSING BOARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

MOTION OF THE AMERICAN CIVIL RIGHTS UNION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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16 pp.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE AMERICAN CIVIL RIGHTS UNION

The American Civil Rights Union respectfully moves the Court pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed *amicus curiae* brief. In support whereof, it states:

1. The American Civil Rights Union was established in 1998 as a § 501(c)(3) as an educational and legal charity dedicated to basic constitutional issues. Its purpose is as stated on its Internet webpage is "Civil rights are the fundamental liberties that all Americans should enjoy as a matter of basic morality, as well as constitutional protection."

2. The Policy Board of the ACRU consists of The Hon, Robert Bork, The Hon. Robert B. Carleson, The Hon. Linda Chavez, The Hon. Edwin Meese, III, Mr. Joseph Perkins, The Hon. William Bradford Reynolds, The Hon. Kenneth W. Tomlinson, Professor James Q. Wilson, Ambassador Curtin Winsor, Jr., all of whom in one capacity or another have been active throughout their careers in constitutional issues.

3. The interest of the ACRU in this case is the Court's first impression consideration of the authority of the Florida legislature (and any other state legislature in any future election) under the Constitution, Article II, Section 1, paragraph 2, to adopt and control the process of choosing its Electors for President and Vice President.

4. Counsel for the Amicus has contacted the counsel for the Parties in this case and understands, that while this is being typeset, all Parties are entering into a Consent Order for the acceptance of all Amici briefs, making this Motion unnecessary.

Respectfully submitted,

JOHN C. ARMOR
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INTEREST OF AMICUS[1]

The interest of the Amicus, American Civil Rights Union, in the central issues of this case is as described in paragraphs 1-3 of the Motion for Leave to File Amicus Curiae Brief, *supra*. These statements are incorporated here by reference.

SUMMARY OF ARGUMENT

This case concerns a decision of the Supreme Court of Florida that changed substantive provisions of the Florida election law concerning the presidential election. The precise questions posed by this Court both address whether the actions of the Florida Supreme Court are in accord with the federal election statutes codified in Title 3, beginning in 1877 in response to the contentious Hayes-Tilden Election of 1876.

These statutes have a specific constitutional basis in Article II, Section 1. Respect for that basis, that the state election laws are committed to the "legislature," not to the courts, nor to referenda, not to any other entity than the elected representatives within each state. The Congressional statutes depend on that authority.

Based on both the theory of American government and a prior decision of this Court on the meaning of the word "legislature," the ACRU believes that the Florida Supreme Court has not only violated those statutes, but has also violated the plain language of the Constitution itself.

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1. This *amicus curiae* brief filed in support of the Petitioner was funded solely by the ACRU and authored entirely by counsel for the ACRU.

This is a highly volatile election, and there could be either a resolution of the outcome or even a concession by one of the candidates. But, even in that case, the Amicus believes that this Court should resolve the issue for the purpose of proper conduct of presidential elections, as it has in the past.

As this brief is written, the Certification of Election has just been signed in Florida, awarding the 25 Electoral College votes in that state to George Bush. The Amicus understands that Electoral College results in two other states' results are undergoing an automatic recount under state laws, but would not affect the national result, regardless of their outcomes. Litigation on several Florida issues will apparently will be filed Monday morning, so the ultimate outcome is unknown.

ARGUMENT

I. According to a Prior Decision of this Court, the Word "Legislature" as Used in the Constitution Means the State Legislature, and No Other Entity

While the question of the constitutional basis of the state part of federal presidential elections has never been before this Court, the question of what the Constitution means by the word "legislature" has been decided by this Court.

Hawke v. Smith, 253 U.S. 221 (1920), presented the Court with the question whether the State of Ohio could conduct a binding referendum, under its own Constitution and laws, concerning the ratification by that state of the Eighteenth Amendment which created Prohibition. The legislature of Ohio had already acted to ratify that Amendment, but that action was petitioned to referendum, which would have reversed that ratification if it passed.

The decision of this Court was that the Framers of the Constitution well understood the leaning of the word "legislature" in Article V. As this Court then said in *Hawke, supra*, at 227,

> The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

Later in the opinion, this Court was even more clear in the meaning of the word "legislature." It said,

> What did the framers of the Constitution mean in requiring ratification by "legislatures"? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people,

Hawke, at 227.

The Court concluded, therefore, that the only action directed and permitted by any state in ratifying a constitutional amendment was the action of the state legislature itself, and no other action including any referendum by the people.

In the instant case, Article II, Section 1, commits to the "legislature" of each state the writing of the laws for the choosing of the Electoral College. The freedom of the legislatures to act within that grant of power from the United States Constitution is demonstrated by the fact that Maine and Nebraska have chosen to have their two Electors who match their Representatives elected by congressional district, rather than statewide, winner-take-all contests. (If all states had selected district election of Electors, odds are the 2000 Election would have been over, early on the morning of 8 November, and all the uncertainty and litigation that has occurred would have been eliminated. But that is a consideration for the future, not for this case.)

There is no reason to believe that the Framers were any less aware that the word "legislature" was "plain, and admits of no doubt in its interpretation" when they wrote the Electoral College provisions, than when they wrote Article V. Until and unless Article II, Section 1, of the Constitution is amended in such manner as the people, through Congress and their state legislatures shall decide, any action of any entity, in the courts or in the executive in any state which rewrites provisions of the provisions of its presidential election process, should not stand.

Other parties to this case will fully discuss the statutes Congress has passed pursuant to Article II, Section 1. This Amicus will not address those statutes except to say that the grant of power to Congress to adopt them, and the mandate of this Court to apply them, both rest on the express language of Article II, Section 1.

A. The Only Action the Florida Supreme Court Could Have Taken under Article II, Section 1, of the Constitution Would Have Been an Advisory Opinion.

A decision made by then-Justice Rehnquist, sitting as a Circuit Justice, leads to this conclusion. In *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), the question presented was whether an advisory referendum could be conducted in Nevada concerning the legislature's possible ratification of the Equal Rights Amendment to the United States Constitution.

The appellants in *Swackhamer* relied on *Hawke, supra*, for the conclusion that a referendum could play no part in the ratification process, and therefore they were entitled to emergency relief to prevent that referendum from taking place. Relief on that basis was denied in the lower courts, and the request for emergency relief came before then-Justice Rehnquist as Circuit Justice.

Because the referendum was "non-binding," and the Nevada legislature was free to carry out its sole and constitutional duty of ratifying the proposed amendment, this Court concluded that the referendum did not violate the Article V definition of "legislature."

The conclusion was,

> Under the Nevada statute in question, ratification will still depend on the vote of the Nevada Legislature, as provided by Congress and by Art. V. I would be most disinclined to read either Hawke, supra, or Leser, supra, or Art. V as ruling out communication between the members of the

> legislature and their constituents. If each member of the Nevada Legislature is free to obtain the views of constituents in the legislative district which he represents, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort,

Swackhamer, 1377, 1378.

There are statutes which allow courts to issue advisory opinions under specialized circumstances. Given the importance and urgency of this particular matter, the Florida Supreme Court might even have used its general equity powers to issue an advisory opinion to the parties in this matter. By analogy to the present case, *Swackhamer* suggests to this Court that an advisory opinion by the Florida Supreme Court would have been entirely appropriate.

What made that Court's action inappropriate was not its opinions about the operation of Florida law, which could have been considered by both Secretary Harris and the Florida legislature, but the binding nature of its orders, which struck down statutory requirements established by that legislature and binding on that public official, under Article II, Section 1.

A word must be said about deadlines. All deadlines are "arbitrary" to some extent, whether they are set by legislatures, courts, or anyone else. Even the calendar by which all deadlines are measured is itself arbitrary, if one goes back to Pope Gregory in 1582 when he established it by papal fiat and removed ten days from the year. Neither this election, nor modern life in general, would be possible if the standard was "do things whenever you get around to it"

The question is not whether the deadline for certification by Secretary Harris was "arbitrary." The question is who has the responsibility for setting that deadline. The constitutional answer is, that power belongs solely to the "legislature."

B. American Political Theory also Supports the Decisions of the Framers to Give Control of the Election of Presidents to Elected Officials, Both State and Federal.

In the view of the American Civil Rights Union, the text of the Constitution resolves the questions presented in this case. However, there are philosophical reasons well grounded in American political theory why the process of electing Presidents of the United States should be in the hands initially of the legislatures that write the election laws, and in the hands of Congress thereafter.

Thomas Jefferson wrote to a friend about the essential difference between courts and legislators as deciders of public policy. The Amicus hopes that the Court will consider Jefferson's words without offense.

> Contrary to all correct example, [the Federal judiciary] are in the habit of going out of the question before them, to throw an anchor ahead and grapple further hold for future advances of power. They are then in fact the corps of sappers and miners, steadily working to undermine the independent rights of the States and to consolidate all power in the hands of that government in which they have so important a freehold estate.

Thomas Jefferson: Autobiography, 1821. ME 1:121.

Of legislators, however, Jefferson wrote, "It is not from [the Legislative] branch of government we have most to fear. Taxes and short elections will keep them right." — Thomas Jefferson to Thomas Ritchie, 1820. ME 15:297

Jefferson, of course, understood as well as anyone the need for independence of judges in order to make judicial decisions free of political interference. However, the opposite conclusion also follows, that political decisions must be made by political bodies. This is what the Framers did in crafting Article II, Section 1, at issue in this case.

In short, Jefferson's observation deals with the remedies available if the decision-makers reach conclusions that the American people, in their ultimate sovereignty, conclude is wrong. Legislatures, both state and federal, face regular, partisan, contested elections. If in the judgment of the people of Florida, or the people of the United States, that such actions in the 2000 Election were wrong, those elected officials will be removed from their positions, The remedy for political mistakes will be political.

If, on the other hand, courts make such decisions, there is no remedy. State judges in Florida face "retention" elections every six years,. Federal justices and judges, by deliberate decision of the Constitution, face no elections whatsoever. This is immensely important for the independence of the judiciary from political pressures.

But, it is precisely this independence from the political process which supports Jefferson's conclusion that political questions should not be decided by judges. And the *uber*-political question in the United States is the election of its President.

To the same effect is the discussion of the "mode of appointment of the Chief Magistrate of the United States" in *The Federalist*, No. 68, written by Alexander Hamilton. The hopes of the authors of *The Federalist*, that the Electoral College "affords a moral certainty that the office of President will never fall to the lot of any man who is not in eminent degree endowed with the requisite qualifications," have fallen short of the mark in some instances. "Talents for low intrigue and the little arts of popularity" have led to some less than eminent administrations.

Still, the theory of the election of the President, there presented, still holds. Both the members of the Electoral College, and the Members of the House of Representatives who would act if the College failed to produce a majority, were subject to direct election by the people. The central decisions were all political, and to be made in the political process. This is in accord with Title 3. This is not in accord with the rewriting of the terms of this election in Florida by the Florida Supreme Court.

C. The Application of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to the Instant Case Does Not Support the Action of the Florida Supreme Court in this Matter, but Does Support This Court's Continuation to a Decision Even if the 2000 Election is Concluded before the Hearing on This Matter

On an accelerated schedule such as this case, it is impossible for any Amicus to see the legal positions of the parties outlined in detailed Petitions for Certiorari. However, on information and belief from following news accounts, including public interviews with leading counsel for all sides in this matter, the American Civil Rights Organization

believes that those who support the actions of the Florida Supreme Court will advance this Court's decision in *Anderson v. Celebrezze*, *supra*, as a basis for the Florida Supreme Court to act in this matter, and therefore for this Court to allow its decision to stand.

The author of this brief was the legal architect of both Eugene McCarthy's litigation in 1976 and John Anderson's in 1980, to obtain ballot access in the several states as independent candidates for President. The history of the McCarthy litigation, which struck down the election laws of 26 states, is in the *American Bar Association Journal*, August, 1977, at p. 1108. The history of the Anderson litigation, which struck down election laws in ten states, is reviewed in the *Anderson* case, itself.

All of these cases, in all years and at all levels concerned only the right to compete, the chance to be on the ballot without First Amendment discrimination based on the political beliefs of the candidate. None of these cases had anything to do with Article II, Section 1. These cases would have been exactly the same if the Electoral College had been abolished before those elections, in favor of direct, popular election of the President.

None of the supporters of Eugene McCarthy in 1976, and few of the supporters of John Anderson in 1980, were under any delusion that either could win the Presidency. All of those supporters were firmly convinced, however, that these were responsible voices that should not be silenced under the First Amendment. Neither Article II, Section 1, nor the Electoral College was ever mentioned in any of those cases.

So, this entire line of cases fails to support a conclusion that the Florida Supreme Court was correct to act as it did in the instant case.

The present case, on the other hand, deals with who could, should, and would be elected President of the United States. It deals directly and unavoidably with specific grants of power by the Constitution to the legislatures of the several states and to the Congress, concerning the Electoral College.

The only application of the *Anderson* case to the present one, is this: This Court should exercise its jurisdiction in defense of the constitutional provisions — which it has begun by granting certiorari. Then, it should use that jurisdiction to eliminate the interference in that constitutional system by the Florida Supreme Court. And further, even if this election should be decided before this Court rules on this case, this Court should still decide the case. Just as the *Anderson* case was worthy of decision in 1983, three years after the election in question, the same consideration applies here.

CONCLUSION

Because of the "plain" language of the Constitution that "admits of no doubt in interpretation" in giving control of the presidential election laws in Florida to the Florida "legislature," the Amicus submits that this Court should rule that the Florida Supreme Court acted outside the bounds of the Constitution and strike down its revisions of Florida law. This conclusion is supported by prior decisions of this Court, and by the American philosophy of political responsibility for political decisions.

Then, having struck down the unconstitutional actions of the Florida Supreme Court, this Court should recognize that its own jurisdiction is then exhausted, and conclude the matter with no other action.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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CLERK

(10)

No. 00-836

IN THE

Supreme Court of the United States

George W. Bush,
Petitioner,
v.
Palm Beach County Canvassing Board, *et al.*,
Respondents.

On Writ of Certiorari
to the Supreme Court of Florida

SUPPLEMENTAL BRIEF OF RESPONDENTS AL GORE, JR., AND FLORIDA DEMOCRATIC PARTY

(Additional Counsel Listed
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November 30, 2000

I. PETITIONER'S DUE PROCESS CLAIM WAS NOT PROPERLY RAISED AND HAS NO MERIT.

Petitioner's opening brief contained no separate due process argument and mentioned the phrases "due process" and "fundamental fairness" only in passing, as part of a discussion of *Roe* v. *Alabama*, 43 F.3d 474 (CA 11 1995) (per curiam). See Pet.Br. 28. Accordingly, Respondents had no occasion to respond to any due process issue in their reply brief. However, Petitioner's reply brief now seeks to resurrect a due process claim. Pet. Reply Br.18-19. That attempt is improper, both because the claim was not raised adequately in the opening brief and because it seeks to smuggle in questions relating to the conduct of manual recounts on which this Court has denied certiorari. In any event the claim has no merit. The Florida Supreme Court's decision did not constitute a retroactive change in the law at all. Even if it had constituted such a change, it would not have deprived Petitioner of any protected liberty or property interest or worked any unfairness, for the reasons we have already stated in our opening brief, at pp. 44-49.

II. THE QUESTION WHETHER THE FLORIDA LEGISLATURE CAN AT THIS TIME APPOINT ITS OWN ELECTORS BY STATUTE IS NOT BEFORE THIS COURT FOR DECISION.

Petitioner's Reply Brief continues to press arguments that simply are not encompassed by the questions that this Court agreed to decide. Thus, Petitioner and his *amici* have continually raised the possibility that the Florida Legislature might convene to enact legislation intended to appoint Florida's electors if the State's courts fail conclusively to decide the disputes pending before them by December 12th. Pet. Reply Br. at 19-20. The validity of speculative

future conduct by the Florida Legislature is not before this Court. It is quite clear in particular that the question whether such state legislation in the wake of an election is authorized by 3 U.S.C. § 2 is not before this Court for decision. The questions presented by petitioners and the additional question suggested by this Court are directed entirely at the validity of the Florida Supreme Court's action as measured against 3 U.S.C. § 5 and Article II, § 1, cl. 2 of the United States Constitution. *Webster* v. *Doe*, 486 U.S. 592 (1988) (question not presented in petition for certiorari will not be considered); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-78 (1938).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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NOV 28 2001

No. 00-836

Supreme Court, U.S.
FILED
NOV 28 2000

IN THE

Supreme Court of the United States

NOVEMBER 28, 2000

BUSH, GEORGE W.
v.
PALM BEACH COUNTY CANVASSING BOARD,
ET AL

BRIEF IN SUPPORT OF NEITHER PARTY AFFIRMING IN PART THE OPINION OF THE FLORIDA SUPREME COURT AND SEEKING EQUITABLE RELIEF

FILED UNDER RULE 37.6 OF THE UNITED STATES SUPREME COURT

BRIEF AMICUS CURIAE ON BEHALF OF DISENFRANCHISED VOTERS IN THE USA

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NOTE:
THIS BRIEF WAS INITIALLY FILED ON BEHALF OF CHARLES WEILER, MARYANN HUNSBURGER AND PATRICK McFADDEN, citizens who voted in the November 2000 Election for the 43rd President of the United States.

By leave of these Amici and of the Clerk of the Supreme Court of the United States, this brief is hereby Consolidated with Petitions Pro Se by two voters who were unaware of the Rules of Procedure of the US Supreme Court of the United States and would have otherwise been without representation in this matter even though they have spent time and effort writing briefs for this case on their own. Those two voters, Gregory Apelain and Justin A. Frank, have joined the original Amici. Their comments essentially parallel the view of the original Amici and therefore will appear as Exhibit 1 and Exhibit 2 of the final version of this brief.

Subsequently, and by leave of these Amici, Exhibit 3 is Consolidated with this brief: Rabbi Richard M. Yellin, a voter and citizen of Palm Beach County suffered disenfranchisement in the recent election because of misaligned, defective ballots.

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Kramer v Union Free School District No. 125 395 US 621 (1969).

League of United Latin American Citizens (LULAC) v. North East Independent School Dist., W.D.Tex.1995, 903 F.Supp. 1071.)

Marbury v. Madison 1 Cranch 137, 2 L.Ed. 60 (1803)

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McDERMOTT, et al , CANVASSING BOARD OF VOLUSIA COUNTY, FLORIDA, Plaintiffs, v. HONORABLE KATHERINE HARRIS,

McPherson v Blacker, Secretary of State 13 S.Ct. 3 36 L.Ed. 869; 146 U.S. 1, 13 S.Ct. 3. 1892

MILLER, a registered voter of the State of Florida Plaintiff, v. KATHERINE HARRIS, Secretary of State, et. Al. DOCKET-

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IN THE

Supreme Court of the United States

NOV. 28, 2000

BUSH, GEORGE W.
V.
PALM BEACH COUNTY CANVASSING BOARD, ET AL
No. 00-836

BRIEF IN SUPPORT OF NEITHER PARTY AFFIRMING IN PART THE OPINION OF THE FLORIDA SUPREME COURT AND SEEKING EQUITABLE RELIEF
FILED UNDER RULE 37.6 OF THE UNITED STATES SUPREME COURT

BRIEF AMICUS CURIAE ON BEHALF OF
DISENFRANCHISED VOTERS IN THE USA

STATEMENT OF INTEREST BY AMICUS

Charles J. Weiler is a voter from the State of New Jersey. Mr Weiler has been an American citizen since he was born, and served in the US Peace Corps. Mr Weiler has been a registered voter since 1972. He is a self-declared "Independent" voter who does not regularly associate with any particular political party affiliation. Maryann B. Hunsberger, a voter from the State of New Jersey, has been an American citizen since she was born, and has been a registered voter since 1976. She is a disabled American. Patrick J. McFadden, is a voter from Pennsylvania, and has been an American citizen since he was born; he has been a registered voter since 1969. Gregory Apelain is a voter from the State of New Mexico. Mr. Apelian has been an American citizen since he was born. Mr. Apelian has been a registered

voter since 1980. Justin A. Frank, MD, is a voter from the District of Columbia, (Washington, D.C.). He has been an American citizen since he was born and has been a registered voter since 1964. Rabbi Richard M. Yellin, a voter and citizen of Palm Beach County, is a self-described Independent voter, previously Republican, and a voter since 1968.

Mr. Weiler and similarly situated US Citizens who voted in the State of New Jersey and other states in the United States during the national presidential election that was held on November 7, 2000 have an interest in preserving his franchise and that of other voters. Mr. Weiler and other similarly situated voters run the risk of having their vote diluted or disenfranchised by any or all unconstitutional Florida State Electoral laws or unconstitutional practices under Florida Election laws that obfuscate their votes so that the will of the people cannot be heard.

SUMMARY OF THE ARGUMENT

A fundamental precept of democracy embraces recourse to the courts after events have occurred. A fundamental precept of asking the courts to solve problems retrospectively is the essence of Judicial Review, which often requires crafting a new rule to fix a pre-existing problem after the problem has become manifest, but in the process also filling the void in the law with a new rule in order to solve the problem at bar. The case at bar involves the decision of the Florida Supreme Court solving a problem by crafting a rule as needed, but not in a prohibited "retroactive" manner. The problem it attempted to solve threatens to disenfranchise voters throughout the United States of America who voted in the national election for the 43rd President of the United States, if the laws in Florida are found to be unconstitutional or if the electoral process in Florida as applied in that election cannot withstand strict scrutiny as the sacrosanct right to vote requires under the United States Constitution. If the Florida law can be repaired as the Florida Supreme Court attempted, there should be a statewide recount of votes. If the law is so flawed that it must be discarded, there

should be a new election as a consequence of these flaws. The legislature, although authorized under the US Constitution to select electors, cannot supplant the will and voice of the people if that voice as expressed through voting has not been clearly heard. The Florida legislature must therefore await such recounted ballots or new election before it can instruct or select its electors.

I. RULE 37.6 NOTIFICATION

All parties to this case have granted a blanket consent for Amici. Note: this brief was initially filed on behalf of CHARLES WEILER, MARYANN HUNSBURGER AND PATRICK McFADDEN, citizens who voted in the November 2000 Election for the 43rd President of the United States. By leave of these Amici and of the Clerk of the Supreme Court of the United States, this brief is hereby Consolidated with Petitions Pro Se by two voters who were unaware of the Rules of Procedure of the US Supreme Court of the United States and would have otherwise been without representation in this matter even though they have spent time and effort writing briefs for this case on their own. Those two voters, Gregory Apelain and Justin A. Frank, have joined the original Amici. Their comments essentially parallel the view of the original Amici and therefore will appear as Exhibit 1, (Gregory Apelian) and Exhibit 2 (Justin Frank) in the final version of this brief.

II QUESTIONS PRESENTED BY THIS COURT:

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. s 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is

inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

3. What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3U.S.C Sec. 5?

III. STATEMENT OF THE CASE

A. POTENTIAL UNCONSTITUTIONAL PRACTICES IN FLORIDA IMPACT THE ENTIRE NATION

The United States Constitution (Article IV: Section 1.) requires "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the relief thereof." [See also: Exhibit 1 by Gregory Apelian]

The national election of President and Vice President transcends state boundaries and has implications beyond local (State) elections. Upholding the election laws faithfully executed in other States of the United States requires under the United States Constitution, as a social contract, that each State create through its legislature and implement through its own means lawfully impartial and fair elections. That social contract is codified in Article IV of the United States Constitution, the "full faith and credit" clause.

While the process may be shaped by the legislature of each State in part, that process is subject to judicial review to correct unforseen problems or irregularities, and the integrity of the entire nation election rests upon the good faith belief that each State will respect the other by refraining from improper practices. The appearance of impropriety in an election harms the integrity of the outcome of the whole and therefore is a matter of constitutional and national concern. Furthermore, this

Court has consistently given matters regarding the paramount right to vote strict scrutiny. Democracy so requires. The concept of Judicial Review, endemic in an appreciation of all the workings of this Court and the Courts of the States of the United States is a long-cherished principle of democracy, first pronounced by this Court nearly two hundred years ago, Marbury v. Madison 1 Cranch 137, 2 L. Ed. 60 (1803), which asked questions that would be equally apt before the Florida Supreme Court this year, "2d.If he has a right, and that right has been violated, doo the laws of this country afford him a remedy? [and] 3d. If they do afford him a remedy, is it a mandamus issuing from this Court?"

The Marbury Court exhibited prescience again, regarding events in Florida recent to us but centuries after it wrote its opinion, "It is not the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined".

As stated by Petitioner (p.4)"The choosing of presidential electors is a matter of great national importance and interest." 'As this Court stated in Anderson v. Celebrezze, 460 U.S. 780 (1983), [I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States.' Id. at 794-95. As cited by Petitioner. Furthermore, one need not have a special interest or stake in the outcome of a particular election in order to have a voice as a voter in that election (Kramer v Union Free School District No. 125 395 US 621 (1969). Under vigorous equal protection scrutiny, this Court has suggested that the fundamental character of the right to vote is crucial to ensuring that elected officials fairly represent the electorate. [Laurence Tribe, AMERICAN CONSTITUTIONAL LAW "RIGHTS OF POLITICAL PARTICIPATION" Second Edition, The Foundation Press NY at 1086-87]

One unprecedented aspect of the recent election in Florida is that it has produced a remarkable amount of litigation, characterized by the Petitioner as "chaos". Without addressing the merits of these cases, the mere existence of such litigation demonstrates that the existing Florida laws are, if not unconstitutional, then problematic at best. Dozens of cases have been filed, only a small sample of which are cited here for brevity. (See: McDERMOTT, et al , CANVASSING BOARD OF VOLUSIA COUNTY, FLORIDA, Plaintiffs, v. HONORABLE KATHERINE HARRIS, as SECRETARY OF STATE, STATE OF FLORIDA, and HONORABLE KATHERINE HARRIS, HONORABLE BOB CRAWFORD, HONORABLE LAURENCE C. ROBERTS, as the ELECTIONS CANVASSING COMMISSION, Defendants requesting extended time from the Secretary of State of Florida to count votes; See also: MILTON H. MILLER, a registered voter of the State of Florida Plaintiff, v. KATHERINE HARRIS, Secretary of State, Chief Election Officer, THERESA LePORE. Supervisor of Elections for Palm Beach County, Florida, and FLORIDA DEPT OF STATE, DIVISION OF ELECTIONS Defendant, seeking EMERGENCY MOTION FOR INJUCTIVE RELIEF DOCKET-NUMBER: 00-9004-CIV United States District Court, S.D. Florida. November 8, 2000)

In Miller V,. Harris, above, (withdrawn) Plaintiff voted for a presidential candidate but was unsure of who he voted for as a result of the "confusing and misleading ballot" See also: SIEGEL, et al., Florida REGISTERED VOTERS, PLAINTIFFS/APPELLANTS, and GOVERNOR GEORGE W. BUSH and DICK CHENEY, as CANDIDATES for PRESIDENT and VICE PRESIDENT of the UNITED STATES OF AMERICA, Plaintiffs-Appellants v. THERESA LePORE, et. Al. COUNTY CANVASSING BOARDS of PALM BEACH, MIAMI-DADE, BROWARD and VOLUSIA COUNTIES, Respectively, Defendants-Appellees. 00-15981 United States Court of Appeals, Eleventh Circuit. November 15, 2000; See also ANDRE FLADELL and ALBERTA MCCARTHY and LILLIAN GAINES, Plaintiffs. vs. PALM BEACH COUNTY

CANVASSING BOARD, as constituted by County Court Judge Charles Burton; Supervisor of Elections Theresa LePore; and County Commissioner Carol Roberts; GEORGE W. BUSH, DICK CHENEY, AL GORE and JOE LIEBERMAN, Defendants. CASE NO. CL '00 10965 Florida Circuit Court, Fifteenth Judicial Circuit, Palm Beach County. November 8, 2000 which states in its pleadings: "all of the candidates for the Presidential election were listed on two facing pages of the ballot booklet that is attached to each voting machine. The punch holes for each candidate were in a single column that ran between the facing pages.. The names of independent (non-Democratic and non-Republican candidates such as Pat Buchanan) and the punch holes for such candidates were placed adjacent to the names of the Democratic Candidates, Al Gore and Joe Lieberman. . As a result, many voters, and in particular, many senior citizens, intending to vote for Al Gore and Joe Lieberman, mistakenly punched the punch hole on the ballot card designated for Pat Buchanan and Ezola Foster (hole #2).[That same document continues]"In addition, the holes in the ballot cards for numbers 4 (Gore and Lieberman) and 5 (Pat Buchannan and Ezola Foster) were directly adjacent to the section of the ballot listing the Democratic candidates (Gore and Lieberman). As a result, many voters, and in particular, many senior citizens, intending to vote for Al Gore and Joe Lieberman punched punch hole numbers 4 and 5 in the mistaken belief that such numbers referred to a vote for Al Gore and Joe Lieberman. It has been reported in the Palm Beach Post that in Palm Beach County Reform Candidates (Pat Buchannan and Ezola Foster) received 3,040 votes."). Despite this morass, Florida law does clearly require the counties and if necessary, reviewing courts **"to determine the voter's intent."** Fla. Stat. s 102.166(7) (emphasis added). The totality of the problems described in good faith in these and other pleadings silence the voice of the people in Florida so that the true intentions of the voters remains unknown.

B. STRICT SCRUTINY IS WARRANTED TO PRESERVE THE FRANCHISE

When viewed in the aggregate, the citizen cases filed in good faith (listed above) raise a suspicion of impropriety that merits strict scrutiny when the fundamental right to vote is at stake, especially when the election involved is a national election for the President of the United States.

This situation was further complicated on November 26, 2000 when, pursuant to the first of two deadlines made available to the Florida Secretary of State in her discretion for accepting final vote tallies for certification, the Secretary of State accepted a combination of original tallies from some counties, hand counted-recount tallies with corrections from other counties, and rejected a partial recount from yet another county which requested additional time to complete its task, even though that same county noted that its work would be completed before the second of the court-established deadlines. It has also been reported in news media that there may be anywhere from ten thousand to twenty thousand uncounted votes across various Florida counties. The Voting Rights Act was designed to protect every citizen's vote from precisely such errors. Also, the law is designed top prevent the dilution or usurpation of the votes from blacks, other minorities or other suspect classifications in a pattern, "had all people cast ballots that could be counted along the same lines as their neighbors, Mr. Gore would have gained nearly 7000 (seven thousand) votes. [See New York times, Wednesday Nov 29 2000 "Racial Pattern In Demographics of Error-Prone Ballots" A25 by Josh Barbanel and Ford Fessenden] The same article previously noted that, "The impact of these differences on the outcome will never be known but their potential magnitude is evident in Miami-Dade County, where predominantly black precincts saw their votes thrown out at twice the rate as Hispanic precincts and nearly four times the rate of white precincts. In all, one out of eleven ballots in predominantly black precincts were rejected, a total of 9,904 (nine thousand nine hundred and four)." Id., New York

Times. [See also: Exhibit 2 by Justin A. Frank, MD]

The Voting Rights Act of 1970 was enacted to enforce the Fifteenth Amendment which provides that the right of citizens to vote shall not be denied or abridged by the United States or by any state on count of race, color, or previous condition of servitude. (National Ass'n for Advancement of Colored People, Inc. (NAACP) v. City of Niagara Falls, N.Y., W.D.N.Y.1994, 913 F.Supp. 722, affirmed 65 F.3d 1002.)

Thus, the "standardless" recounting in "chaos" about which the Petitioner initially complained was actually compounded by partisan refusal to accept partial tallies and await a later, but no less convenient deadline before certification [See Petitioner's Brief]. Consequently, whether by intention or by inherent flaws in the Florida Election laws and its attendant process, the Certified votes for Florida at the time of this writing are an incomplete admixture of several inconsistent tallying methods and cannot accurately reflect the will of the people. Such problems, regardless of their cause or their precise number, rise to such a level of magnitude that they encompass the entire voting process and have undermined the integrity of the entire nation's votes, threatening to abridge the Fourteenth Amendment due process rights of all voting citizens in the United States.

The more voters that are disenfranchised in Florida and in the nation, the more we give up our democracy. The good faith obligation of the States to pass and uphold fair election laws is a part of the social contract between the States of the United States that is a fundamental bedrock of our nation's union. Under the United States Constitution Article IV, full faith and credit for the acts of the respective States requires no less than an honorable and honored mutual respect, exhibited in part through fair and accurate election laws and attendant electoral process. To be meaningful, such requirements for full faith and credit necessarily include keeping "such acts, records, and

proceedings" of elections for President and Vice President of the United States. Furthermore, the failure of any one State to uphold its portion of the social contract that requires fair, accurate and objective counting (or recounting) of ballots is a breach of the social contract between the States of the United States as expressed and implied in the US Constitution. Such a breach of the social contract taints the entirety of any national Presidential election, thereby disenfranchising all citizens who voted in said national election.

IV. QUESTIONS PRESENTED TO THE COURT

QUESTION 1: Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. s 5, which requires that a State resolve controversies relating to the appointment of electors under "laws enacted prior to" election day.

A. JUDICIAL REVIEW, ALTHOUGH RETROSPECTIVE IS NOT A RETROACTIVE USE OF THE LAW.

Petitioner mis-characterizes the decision of the Florida Supreme Court as "retroactive" and perhaps even prohibited "ex post facto" laws (See Petitioner's Brief) . Yet, the logic of a situation rife with inconsistencies in the written legislative statute mandates that a court review the election laws as applied to ballots cast by voters. Such review can only occur after the electoral process has revealed its embedded errors, and therefore by definition must be a post-hoc review. To be meaningful, the court must be able to rule without being considered to have written prescribed retroactive or ex post facto rules. The Constitutional principle of Judicial Review has long been known to this Court, first articulated nearly two hundred years ago in Marbury v. Madison 1 Cranch 137, 2 L.Ed 60 (1803).

Petitioner has noted, "Given the national significance of the

Florida election results, it is essential that the counting of ballots be conducted in a fair and consistent manner in accordance with established Florida law". Petitioner fails to point out that the system, absent judicial intervention, had reached an impasse because of the legislature's failure to provide clear deadlines for beginning or completing requested or mandatory recounts of ballots. The Florida Supreme Court crafted a deadline to save the statute. In Marbury v. Madison 1 Cranch 137, 2 L.Ed. 60 (1803), whose remarkable prescience speaks to the issues at Bar, [supra] this Court further opined, "Those then who controvert the principle that the Constitution is to be considered, in court, as paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law".

If anything, the more convenient was also the later deadline: Tallies accepted at the first deadline required the Secretary of State on Sunday November 26 2000 to open her offices, which would otherwise be closed for the National Holiday of the Thanksgiving weekend; the second deadline was Monday morning at 9a.m.

B. THE FLORIDA COURT RULED NARROWLY, CONSISTENT WITH THE UNITED STATES CONSTITUTION AND THE VOTING RIGHTS ACT OF 1965 AND THE OBLIGATION OF COURTS TO RESOLVE POST-ELECTION DISPUTES

To the extent that errors in the Florida electoral process impinge on the franchise within and without the State, the Florida Supreme Court surgically attempted to reconstruct the broken fragments of the statute in order revive an otherwise lifeless will of the people as it was laid before its bar.

To rectify this situation requires either a statewide recount with appropriate guidelines set forth by this Court, or a new election under new laws. The Florida Supreme Court held that the right to vote is the paramount right and therefore read savings measures into the text of the otherwise unworkable statute that governed the Florida election for the 43rd President of the United

States. The alternative would have required the voters to hold a new election without clear rules to govern the election.

Absent a special session of the Florida legislature to craft such rules six or more days prior to the election itself. The Florida Supreme Court articulated again the principle often expressed by this Court, that the primacy of voting and respect for the exercise of the franchise is a fundamental right to all citizens. The court reaffirmed that voting is the paramount right of the people; one that could not be supplanted or transgressed by hyper technical attention to deadlines, if the price of those deadlines cost voters their rights. Marbury v. Madison 1 Cranch 137, 2 L.Ed. 60 (1803), "It is emphatically the province and duty of the judicial department n to say what the law is".

Petitioner has erroneously claimed "By retroactively changing the law in Florida through judicial intervention, the Supreme Court of Florida's decision preventing the Secretary of State of Florida from exercising her legislatively conferred authority to perform the act of certification that would complete the electoral process in Florida has added to that angst and has strayed from established federal constitutional and statutory law."

If anything, however, the Florida court ruled too narrowly and with too little retrospective oversight, leaving to the discretion of the counties the methods for recounting votes and a too-small window of opportunity for recounting by hand the votes in densely populated counties, who later abandoned their recount efforts. To the extent that the Petitioner complains there are no standards, the court wisely attempted to defer to counties to allow them their traditional freely chosen methods, in a reading of the very clause that Petitioner cites for the argument that the States shall choose electors "in such Manner as the Legislature thereof may direct". In essence, the Petitioner's suggested reading of the United States Constitution is counter-intuitive; restraining the counties from determining the methods of tallying the ballots from their own voters while giving the legislature unbridled discretion regarding the selection of

electors. Neither of these approaches can be tolerated if they fail to pass constitutional muster under the strict scrutiny afforded the right to vote.

Petitioner continues: "The manual recount underway in certain Florida counties is unconstitutional because it is being conducted in the absence of meaningful objective standards." A recount cannot, by its nature be, unconstitutional. The methods written by the legislature to achieve the tabulation and recording of votes can, however, be so flawed that the system is unconstitutional as applied in a given case. We believe that in this case, the Florida law has been applied in a manner that is unconstitutional and must be rectified or in the alternative, if it is indeed beyond repair, then new rules must be set forth by this Court or the Florida legislature in a timely manner with a new election by Florida voters for the 43rd President of the United States.

The lack of adequate timetables in the Florida Electoral law for candidates to request recounts, and for recounts to be completed; the ambiguity within the Florida statute that did not reveal a specific preference for hand counted-ballots or machine counted ballots for the purposes of recounting; and the absence of any clarifying instruction on a statewide basis to determine how electoral ballots are to be counted are not necessarily fatal to the statute in itself if any one of these problems could be viewed in isolation.

The totality of these peculiar circumstances, however, makes it so very difficult to sort out the precise nature of the problems that questions can be answered and problems can be corrected. There remain the lingering doubts raised by improperly drafted ballots that were not legible to voters; improper tallying by a hodgepodge of methods with so-called "standardless" procedures; (See Petitioner's Brief, in several instances) defects in the availability and accessibility of voting places themselves. Media accounts suggest that these irregularities also have occurred in great proportion in areas inhabited by blacks, minorities and certain ethnic groups, whose voting rights enjoy

special protection under the Fourteenth and Fifteenth Amendments of the United States Constitution, as implemented Congress in the Voting Rights Act and upheld by this Court in previous cases. The aim of the Voting Rights Act is to prevent political bodies from implementing election systems or practices which Act, whether intentionally or not, to minimize, cancel or dilute the voting strength or political effectiveness of minority groups. (League of United Latin American Citizens (LULAC) v. North East Independent School Dist., W.D.Tex.1995, 903 F.Supp. 1071.) Such discriminatory consequences, whether intended or not, would also raise concern that the entire election was tainted by potential violations of the Voting Rights Act.

Thus, the post-election "judicial limitations" in this case that concern the Petitioner were designed to foster, rather than burden, constitutional due process. The Florida Supreme Court carefully reasoned in order to save a defective election process, in order to avoid the very confusion that confronts our nation today.

In this regard, the Florida Supreme Court should not be reversed for having been too deferential to a statute that was in fact defective. The election laws, and not the written opinion of the reviewing court that attempted to mend the statutes errors, was inartfully drafted and has thereby obfuscated the will of the people. The choice before this Court, therefore, is whether to further rectify the errors in the statute by reading into it new deadlines that will reasonably allow time to recount by hand or otherwise all of the ballots of all the voters in the State of Florida, or in the alternative, declare the statute and the election that was conducted pursuant to it invalid, thereby requiring a new election to be held in the State of Florida to determine who will be the winner of the 43rd Presidential election in Florida.

C. VOTING RIGHTS OF ALL VOTERS ARE IMPACTED BY THESE CIRCUMSTANCES REQUIRING A COMPLETE RECOUNT OF ALL

BALLOTS OR A NEW ELECTION

Under the Civil Rights Act 42 USC 1983 and the Voting Rights Act 42 USC 1973 and the Fourteenth Amendment of the US Constitution , The right of the people to vote and to express their political will in elections by exercising their franchise is sacrosanct under the US Constitution and is protected by the Voting Rights Act as upheld in South Carolina v Katzenbach 01, 314-15 (1966).As evinced by the pending or withdrawn litigation cited above, these allegations filed in good faith by citizens are only a small fraction of the totality of the irregularities and improprieties within the voting process as it was conducted in Florida in the November 2000 Presidential election.

The U.S. Constitution, Amendment XIV: Section 1 clearly protects the franchise of all citizens equally regardless of state of residence: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United State; nor shall any state deprive any person of life, liberty, or prosperity without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Any effort to undermine the integrity of this vital social contract that binds the States to each other by allowing a State to fall below the necessary minimum protections of the right to vote for its citizens in a National Presidential election undermines the integrity of all of the states and taints the valued franchise of citizens in those states that have followed the agreed upon due process standards. Such protections are reinforced by the Voting Rights Act (42 USC 1973) (quote) 42U.S.C.A. §1973 UNITED STATES CODE ANNOTATED TITLE 42. THE PUBLIC HEALTH AND WELFARE CHAPTER 20--ELECTIVE FRANCHISE SUBCHAPTER I-A--ENFORCEMENT OF VOTING RIGHTS ""§§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

In order for the national election of the 43rd President of the United States to be viewed as fair and impartial in the eyes of all USA voters who participate in that process, as well as the world or other third party objective observers it is imperative these federal standards, set forth in the Voting Rights Act as upheld by this Court, be met. When use of the law is popularly viewed as unfair and people believe that something happened that was improper, such that voters feel cheated by the process itself in Florida, (whether or not there has been any underlying fraud or corruption in the process itself,) impurity of the voice of the people thereby undermines the voice of all franchised voters who voted in the same national election for the US President.

These types of irregularities bespeak an underlying corruption in the process, whether or not any such improprieties have occurred and resemble more of the civil and political rights issues seen in foreign nations than the USA's proud democratic history. The harms caused by that appearance of impropriety which is repugnant to our democratic system of governance must be remedied. In such a case the sole valid remedy must be to remove the taint upon the people's franchise by calling for a re-election whereby the voters of Florida whose voice has been

overtaken by the existing system will have a new opportunity to vote for the President and Vice President of the United States.

QUESTION 2:

Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."

A. THE UNITED STATES CONSTITUTION ALLOWS LEEWEAY TO THE STATES BUT DOES NOT ALLOW OR ENCOURAGE LEGISLATORS TO SUBSTITUTE THEIR WISHES OR DESIRES FOR THE WILL OF THE PEOPLE.

Ironically, the answer to Petitioner's seemingly obvious question in this case is one of first impression without precedent before this Court. Thus, we must look to the logic of the plain meaning of the words in their context, as a part of the totality of the precepts that create a framework for democratic republican governance, in order to guide the use of these words. Although States are left to fashion their methods of determining electors as their representatives, it is nonetheless dictated by logic as well as constitutional principles that such electors must vote in a manner that is consistent with the will of the majority and that any selection before all votes have been counted, or any selection based on an arbitrary portion of the votes to be tallied (but not all the ballots cast that have been tallied) is a usurpation of the legitimate power of the people as expressed through exercising their franchise. It is unlikely, if not inconceivable, that the US Constitution could be read to allow Florida legislators (or the legislators of any other State) to simply select a Presidential candidate of their choice who has not been chosen by the majority of the voters in their state. The full faith and credit clause Article IV of the US Constitution, demands that such appointment of electors be achieved without abridging the

rights of any voters in order to maintain the integrity of the votes of citizens from other states. Marbury v. Madison 1 Cranch 137, 2 L.Ed. 60 (1803), instructs us that in such situations, " The constitution is either superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable".

The US Constitution grants States leeway and discretion in selecting their electors, but only insofar as the selection is consistent with the fundamental precepts of democracy. The choice must not be anarchistic or autocratic, but consistent with democratic principles, guided by and reflecting the will of the majority of the voters in that State. Furthermore, the methods chosen by said legislatures must comport with the parameters of democratic governance set forth in the United states Constitution and must exhibit mutual respect for the other States, consistent with Article IV's commitment by the States to accord each other full faith and credit. Thus, the States have reserved the right to make certain discretionary choices regarding the methodology for selecting electors, but the candidate for whom those electors cast their ballots must be chosen by democratic means and must be consistent with the wishes of the majority of voters in the State.

B. "THE RIGHT TO VOTE" IN THE U.S. CONSTITUTION IS SUPREME OVER ANY STATE LEGISLATURE

AMENDMENT XXVI [1971]Section1. "The Right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age"
Section 2. "The Congress shall have power to enforce this article

by appropriate legislation"

"The right to vote" could be rendered meaningless if it cannot be used to direct legislators to represent the will of all the people when selecting Electors for the Presidency of the United States. Long-standing case law demonstrates that such selection can be "winner take all" or be ruled by "proportionality" [McPherson v Blacker, Secretary of State 13 S.Ct. 3 36 L.Ed. 869; 146 U.S. 1, 13 S.Ct. 3 (1892.)]. Without question, the Legislature of each State is bound by law and its obligation to all of the other States within the United States, to uphold not supercede vital United States Constitutional principles when deliberating and selecting Electors.

The "Supremacy Clause" of the United States Constitution, Article VI , "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;.... shall be the Supreme Law of the Land;... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".

"The Right to vote" as stated in Amendment XXVI and as implied in Article IX (below) Article XV (supra) Amendment XIX (supra) is only one of a host of other portions of the United States Constitution. This last Amendment is the final component in the United states Constitution that completes the universal reach and importance of the right of the franchise in the United States of America. In the course of two centuries of struggle around issues of the franchise, Our laws previously had granted the franchise to citizens in a multi-tiered approach, from its inception to the contemporary times.

Historically, it is unfair but true that first, the U. S. Constitution as ratified by the States in the eighteenth century granted representation to free, property holding white men over age 21 who were treated under law as "whole persons". The plain language of the United States Constitution in those early times of the eighteenth century expressly excluded Indians and persons not "free" Such persons were counted as "three fifths of a

person" in (year) for the purpose of representation and taxation. It is important to note here that such a narrowly limited franchise would be viewed politically untenable and repugnant to the U.S. Constitution today.

Nonetheless, the two-tiered and inherently unequal formula that was embedded in the original Constitution of the United States, although modified, made possible the survival of the young Nation. Although limited franchise is now viewed as arcane, this political compromise was actually vital to the establishment of the Nation: the formula was derived as a part of a greater legislative compromise in order to form a more perfect union by granting representation to slave-holding states according to their population, but without admitting that slaves were "whole persons" who would arguably be vested with the right to vote. Constitutional scholars and historians have taught us that without the support of slaveholding states, the entire constitutional structure that is our democracy would not have survived.

Then, following a bloody internal war and deliberate efforts at social change, the United States Congress and the States of the United States very slowly and deliberately Amended the U.S. Constitution so that "the right to vote" could not be denied on ground of previous servitude (slave status) thereby granting the franchise to black males (Amendment XV, 1870). This unprecedented sweeping change occurred nearly a century after the original ratification of the United States Constitution, and still the franchise excluded Women and Indians.

In 1920, the United States Constitution was Amended to extend the franchise to Women. When Amendment XIX was ratified by the States, the franchise could no longer be denied on grounds of sex, thus granting the franchise to women regardless whether black or white. In time also, Indians have also been granted citizenship, if born in the US and paying taxes, and with it, the right to vote.

Lastly, the term "right to... vote" as it appears in Amendment XXVI prevents denial of the right based on age (1971). Thus, "The Right to Vote" which was once a limited franchise is now an express Right of the all the Citizens of the United States. This may mean that our Constitutional limits on the power of the State legislatures in selecting Electors for the Presidency has also changed, to reflect and become consistent with the evolution of United States political history.

Significantly, "The right to vote" is stated clearly in Amendment XVI and was subject to ratification by the legislatures of the States of the United States. It is, therefore a legislative act by the States Legislatures themselves, as well as a clearly articulated U.S. Constitutional principle, binding on the States.

The concept that a constitutional principle, even one that is not clearly articulated, can be binding on the federal government as well as the States was found to exist by this Court in Griswold v Conn. 381 US 479, 85 S.Ct. 1678, 14 L.Ed2d 510(1965). In Griswold, the Court found rights that were not expressly articulated in the U.S. Constitution itself were reserved to the People, in the penumbra of the Amendment IX of the United States constitution: [1791] Amendment IX "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".

The Ninth Amendment has been rarely cited, but it has been held by this Court that the implied rights "reatined by the people" not enumerated in the rest of the text but are found in the interstices of the United States Constitution.

In Griswold, this Court upheld the right of married couples to choose contraception even though the protected right at bar was not expressly stated but implied in the federal constitution and binding on the States. Certainly, if the federal rights protect contraception rights (which might have First Amendment religious implications to militate against such a finding), then there can be no question of the primacy under United States

Constitutional law and the law of the States regarding the sacosanct bond between the People and the State embodied in the act of voting.

This Court has been asked to examine the precedent of McPherson v Blacker Secretary of State 13 S.Ct. 3 36 L.Ed. 869; 146 U.S. 1, 13 S.Ct. 3. October 17, 1892. as it might apply to the matter prematurely brought before this Bar. McPherson concerned the right of the 19th Century Michigan Legislature to alter the means for allocating electoral votes under State law and demonstrates that States do have leeway in such matters regarding the "manner of selecting electors".

McPherson, if not inapposite in this context, is certainly a misleading precedent if used as a guide, because of two important factors that the Court did not discuss aloud: First, McPherson concerned the use of proportionality, rather than a "winner take all majority" of electoral votes when selecting electors. Such a change, although novel, was in fact bringing the electoral votes closer to the People: enabling them to reflect the multi-faceted will of the majority, by sending electors for more than one candidate to the Electoral College for President. Certainly, were Florida to do the same for our Electoral College on December 18, 2000, many people would feel far more secure about the future role of democracy in our Republic and voters who had voted for one of two leading candidates when there is no clear majority in Florida would not feel disenfranchised as they complain about here.

Secondly, there has been remarkable and irretrievable social change in the century and a quarter since the McPherson decision. To overlook the changes that brought the "right to vote" to codification for blacks, Indians, and women is to naively overlook what Justice Douglas of this Court called, "the dynamic component of history".[Justice William O. Douglas, Eighth Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York April 12 1949, Essays on Jurisprudence from the Columbia Law Review,

Columbia University Press New York and London 1963 Reprinted with permission from 4 The Record of the Ass'n of the Bar of the City of New York No 5 (1949). "So far as constitutional law is concerned, stare decisis must give way before the dynamic component of history. ... It will then take an oncoming group from the new generation to catch the broader vision which may require an undoing of the work of our present and their past.". Having previously noted in the same essay that "Rules that once seem fixed and certain today seem beclouded", but viewing such changes in stare decisis as healthy for human progress towards equality.]

In essence, the views of the U. S. Constitution itself have evolved away from the two-tiered notion that there were "three fifths" persons for representation and "whole persons" and has completely filled this chasm with the "Right to Vote" articulated in the XXVIII Amendment of the U. S. Constitution.

This social change explains and requires a new, more deomcoratic and majoritarian view of the legislature's role in selecting electors as representatives of the people to elect the President and Vice President of the nation compared to the approach employed a century ago. Although there was an incohate right to vote among those who had the privilege of a franchise in the 1890's, that population was so small that there would be armed insurrection by the disenfranchised if anyone believed there was a right to vote. Indeed, suffrage was the subject of rioting in the 19th century. Now, the riots are over, there is calm and there is universal suffrage among people over 18 in the united States. The legal distinctions that governed the parsed concepts of the franchise in the Nineteenth Century are gone; the 21st Century enjoys a codified "Right to Vote" that must be heard and heeded by all.

The confusion, characterized by Petitioner as "chaos" that our nation is witnessing in Florida is the playing out of the final patching of the holes created by the initial chasm that was created to deliberately deprive votes to blacks and women, in

order to form a more perfect union two hundred years ago. Such theories that governed the times of McPherson, whether or not they were morally and constitutionally correct even in their own context, do not exist today. In 1896 in Plessy v Ferguson 163 US 537 (1896) d that "separate but equal" accommodations" in railways were legal, thereby granting an imprimatur to a two-tiered society that was racially divided. McPherson was part of that greater context, too, and therefore must be viewed cautiously when seeking its guidance for precedent: McPherson must be viewed as having been altered by the "dynamic component of history".

Significantly, in Brown v Board of Education, 347 US 483, 74 S.Ct 686, 98 L. Ed. 873 (1954) Plessy v Ferguson was overruled. Brown represented a landmark decison for its substance and also because it is one of the few times if ever that this Court has ever reversed its own opinion by specifically overruling its own doctrine of articulated Constitutional law, this Court courageously and unanimously erased the validity of the Constitutional theories that governed a two-tiered society in McPherson's time.

The importance of this change in U. S. Constitutional law cannot be understated or undermined. Instantly, laws that were upheld as legal were wrong and illegitimate in their terms by the terms of Brown as articulated by this Court.

It has taken decades of struggle to self-correct the important embedded errors in the legal system that came about through this two-tiered history, and statutes like the Voting Rights Act, and the right to public accommodation to ensure the public's access to voting in the Americans With Disabilities Act (ADA) 42 U.S.C. 1221 (1990) are a part of that heritage designed to extend voting in the United States federal elections to embrace new constituencies who were disenfranchised under the prior regime of the laws.

It is a part of the "dynamic component of history" [See; Douglas

infra] that these vestiges of the racism and sexism that were institutionally embedded in the old two-tiered system (now overruled as illegitimate) should be played out in Florida. According to Richard Hofstadter , William Miller and Daniel Aaron The United Stats: The History of A Republic" Prentice Hall, Inc. Englewood Cliffs New Jersey 1957 Second Edition 1967, pp 478-479 "VI. The Extension of White Supremacy" and "The Solid South"].

C. THE WILL OF THE PEOPLE OF FLORIDA IS PRESENTLY UNKNOWN

It would be unconscionable, as well as unconstitutional for the legislature to disregard the will of the people by selecting a candidate that the people would not have elected. So too, in an election so close that the difference between the votes separating the certified winner and the loser is smaller than the statistical margin of error for counting, it is unclear whether the will of the people can be discerned or clearly heard. Therefore, the Florida legislature cannot proceed to select electors if either of the two following consequences have arisen: (1) the underlying Florida law that governed the election itself was based on an unconstitutional statute or (2) the votes from the State have not been counted properly or all votes have not been tallied, regardless of the certifications by election officials.

The consequences of finding otherwise, would be the ability of a state Legislature to pick any electors they wish, without regard to the total vote of the people, thereby breaking the full faith and redit clause of the US Constitution.

QUESTION 3

What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3U.S.C Sec. 5?

UNCONSTITUTIONAL ELECTION LAWS REQUIRE REMEDIES SUCH AS RECOUNT OR A NEW ELECTION

If Florida is found to have breached the social contract between the states that implicitly but inevitably is a fundamental part of the respect accorded each and every State of the United States to the other States, breaking the obligation to grant each State "full faith and credit" under Article IV of the US Constitution, immediate and deliberate efforts must be made to repair the breach. Otherwise, such a breach of the social contract by Florida would taint the democratic process of the national election, thereby disenfranchising each citizen in the United States who voted in the election.

The simplest and most trustworthy method for correcting these defects for the immediate question at bar concerning the election of the 43rd President of the United States of America: either recount all the votes in the State of Florida with oversight from federal authorities, or hold a new election with federal oversight pursuant to the precepts of the Voting Rights Act 42 US.C. 1973. Judicial oversight in this regard, despite the disparaging characterization used by Petitioner, is a necessary and appropriate use of the power of Judicial Review as it appears as a gloss in the text of Article III of the United States Constitution, and is commonplace when there are election problems to be sorted out. In the alternative, we believe the People of this Nation will be better satisfied if all the discomfort of the tainted Florida election can be removed by calling for a new direct ballot election in the State of Florida.

CONCLUSION: UNCONSTITUTIONAL LAWS CANNOT BE SUPPLANTED BY THE ARBITRARY SELECTION OF ELECTORS BY LEGISLATORS AND REQUIRE A FULL RECOUNT OF ALL BALLOTS OR A NEW ELECTION

The full faith and credit clause in Article IV of the US Constitution requires that states extend the same rights to all citizens of the United States and to express the same respect for all of the laws of the separate states equally. As Justice Marshall stated in McCulloch v Maryland 17 US (4 Wheat.) 316, 421 (1819), "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to this end, which are not prohibited but consistent with the letter and spirit of the constitution are constitutional".

Due to the exceptionally small margin which is within the margin of error of the machines themselves, a hand count of all ballots in Florida essential to preserving the franchise of every citizen who has voted in this nations'' November 2000 election. It is inconceivable that a manual hand count, although cumbersome and time consuming, can be so long in its duration to amount to a violation of due process rendering it unconstitutional. In the event that this Court finds such delays would harm the Republic without regard to Constitutional issues, it is respectfully requested that there be a new vote in the State of Florida, following, if necessary, laws that may be written by its State legislature to correct defects in existing Florida State Election laws, or such other remedies as this Court may deem appropriate. We nonetheless most respectfully and most vehemently pray that this Court should make every effort to include the votes of all Florida voters, whether by hand count or by a new voter election, so that democratic process will go forward and that the franchise of all voters shall be preserved.

EXHIBIT 1:

Pro Se filing of
Amicus Curiae Brief (now consolidated with
DISENFRANCHISED VOTERS IN THE USA)
On behalf of:Gregory Apelian, Vice President Gore,
Governor Bush, and the American Voting Publicv

On Petition for Amicus Curiae to the Supreme Court of the United States

Gregory Apelian - A Private Citizen,
534 Jewel Court SE,
Rio Rancho, NM 87124
505-994-0390

This Amicus Curiae Brief is being filed in order to ensure my rights as a citizen, under the Constitution of these United States, are protected and fully heard. The brief is to be filed with the Supreme Court of these United States of America on behalf of myself, an American Citizen, Gregory Apelian of 534 Jewel Court SE, Rio Rancho, New Mexico, 87124, and is also filed on behalf of Vice President Gore, Governor Bush, and the entire American Voting Public. This brief is a formal Appeal on Constitutional Grounds for a Corrective Re-vote Remedy to the current Presidential Election crisis.

This brief asserts that the Supreme Court should throw out the results of the first Presidential vote in those states whereby the margin of claimed "victory" was, close to, or less than the statistical margin of error attributed to the unconstitutional punch-ballot system which denies voters their rights to equal protection under the Fourteenth Amendment of the US Constitution. A Corrective Re-vote should be mandated by the Supreme Court on this basis. These unconstitutional punch-ballots are used in 48% of the nation, regularly destroying

the votes of thousands of citizens who all deserve equal protection regarding their right to vote as defined by the Fourteenth Amendment to the US Constitution.

The Constitutional cites contained herein, will provide a practical framework which will reveal the current arguments by Governor Bush's lawyers and Vice President Gore's lawyers, relative to the Florida Supreme Court Ruling mandating manual re-counts, to be groundless and based on the illusory premise that there was a Constitutionally valid vote worth re-counting in the first place. It logically follows that all re-counts of a vote which was unconstitutional and invalid from the start, become likewise invalid by their intimate extrapolation from the fraudulent current vote tallies.

The Constitutional cites contained herein, also include a Constitutionally-based Remedy, capable of returning the selection of our President to the American Voters, whose equal protection rights under the Fourteenth Amendment have been discarded during this Presidential Election crisis. The Constitutional Remedy contained herein, will also simultaneously restore a truly constructive bipartisan atmosphere based upon sound Democratic application of said Constitutionality (1). The current Presidential Election is being falsely and absurdly tabulated from a grossly deficient voting system with a known margin of error far in excess to what either candidate can claim as a margin of "victory." This simple assertion therefore renders the current vote tabulation invalid, for it is clearly unconstitutional as measured by its inability to satisfy the vital criteria of the Fourteenth Amendment, which guarantees the rights of all citizens to have equal protection under the Law. This would not be the case if the current voting apparatus were the best, most efficient technological system available for casting votes, but as we now have been made so painfully aware, and as a Congressional Election Commission pointed out in a formal report to the Congress, the current punch-ballot system being used by 48% of America's citizens, is grossly innacurate compared to several imminently available,

easy to deploy technologies, which do a far better j! ob in protecting the Fourteenth Amendment rights of equal protection, by ensuring the least possible amount of lost votes due to system error and/or voter error.

Furthermore, the Congressional Commission's twelve year-old report on voting systems, stated specifically that the grossly inaccurate punch-ballot voting systems should be replaced by more efficient methods as soon as possible(2). Therefore, the only just and logical conclusion to the current Constitutionally-protected mandate to supply a "fair and accurate' vote, reflecting the actual will of the American Voters (and not just some unreasonable facsimile), is to replace all punch-ballot type polling machines with simple computer systems, setup in each of the disputed polling places as a replacement for a voting process that we now so glaringly have been made to realize, can never adequately protect the nation's Fourteenth Amendment Rights in a close election.

We The People, deserve as a most basic Right, to have our most cherished act of Democratic Participation, the expression of our votes, to be counted by the most efficient means available. As per testimony of various computer experts, the computer polling areas can easily be setup with central servers acting as the counting "brains" for terminals which will offer voters a simple choice between -- [A] Gore, and [B] Bush. By this corrective method, the American Voting Public will finally be provided with the type of voting accountability we have always deserved as a most basic protected Right under the Constitution. By implementing central servers only in polling places and not connected via phone lines, a completely secure system can be successfully setup in a matter of days using already existing computers out of the various State's bureaucracies. This clear and imminently available remedy should be executed in every state whereby the margin of error of punch-balloting systems was greater than the margin of "victory" claimed by either candidate. By this simple available remedy, America will finally be able to have a certain victor in the Presidential

Election, instead of being forced to suffer with a continuing dark cloud of doubt hanging over our national trust and future, a cloud which is affecting the entire world in ways which are damaging to our global and domestic interests.

The Corrective Re-vote Plan benefits both parties and the American Public equally, by providing a template by which the current litigious downward spiral and inherent divisiveness can be effectively neutralized simply by serving the best interests of all the people and not just two narrowly defined constituencies. Furthermore, if the candidates can be persuaded to enter into this Corrective Re-vote, compromise-agreement willingly, the nation could finally extricate itself from the tangled web of litigation threatening to completely eliminate the importance of the voters in determining this election.

A compromise between the two candidates would effectively take a crisis whereby neither candidate has a chance to be elected without a stain of illegitimacy, and instead, can convert it into a golden opportunity to exercise an historic moment of bipartisan cooperation capable of unifying an entire nation, and even a large part of the globe. Even if it is necessary to enjoin Congress and the President to coordinate this Corrective Re-vote method of Constitutional equal protection, in the name of federal balance and maximum legal validity, this is clearly an effort well worth undertaking, for it is capable of finally satisfying our Constitutionally mandated right as voters, to be the true deciding voice in selecting the next President. As the instructive beacon of democratic virtue and stability for the entire world, we are now charged with a crucial test. Do we stand on the rock of our faithful Constitution, or do we allow the combined pressure of public opinion polls and the media to dictate the course of action to be taken here? Thank you for taking the time to consider the viewpoint of a common citizen. Your generosity of spirit and fairness will not soon be forgotten. SPECIFIC CONSTITUTIONAL CITES RELATED TO THIS APPEAL FOR A CORRECTIVE RE-VOTE OF ALL STATES WITH A MARGIN OF CURRENT BALLOT ERROR IN EXCESS OF

THE DECLARED MARGIN OF VICTORY.

The Fourteenth Amendment is the basis for the urgent Corrective Re-vote remedy sought within this brief -- a restoration of equal protection of every citizen's most basic Democratic Right under the Constitution, which is the official foundation of our National Law. "No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." Liberty is most elementally and significantly defined by our citizen Right to vote and to have our votes counted in the most efficient and voice-preserving manner technologically possible at any given time.

Therefore, the Fourteenth Amendment can be clearly applied and interpreted to mean, every available effort (i.e.. The best current technology available for reducing the number of uncounted and uncountable votes to an absolute minimum) must be vigilantly made a top budgetary/legislative priority in order to count every vote cast. Clearly, the fact that it is a matter of public record, that the Congress' own election commission reported to them over twelve years ago, that America's voting apparatus was badly in need of repair due to an unacceptably high margin of lost-vote error, and yet, here we are these twelve years later, left with the same inefficient, Fourteenth Amendment-breaking equipment, which now has left the nation twisting in the wind and filled with the shrill voices of partisan enmity and division, because we are unable to satisfactorily determine the true Presidential winner from the original, largely bogus, vote tally.

We are charged by our very Constitution, to fix this elemental breach of our Democratic Process as it affects the current election tabulations. A Corrective Re-vote in all states whereby the margin of tabulation error is, close to, or greater than, the margin of claimed "victory," should be accomplished by using

more efficient replacement voting systems which could be setup and executed in less than two weeks. Regarding the legal validity of such a Corrective re-vote mandate, the Constitution provides supportive remedy in the Twentieth Amendment which clearly states: "If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a president elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified." By this language, Congress is capable of legislating that a new, valid voting process be implemented to determine the true will of the voters. This can be simply accomplished by replacing antiquated voting methods which are in violation of the Fourteenth Amendment, with currently available, easy to install technologies which, by the opinions of numerous computer experts, could be easily configured and deployed in less than two weeks, thereby finally producing a vote tabulation which genuinely does everything humanly possible to count the maximum number of voters ballots, successfully and with a much more narrow margin of error than is available via the punch-ballot system.

Another Constitutional Provision which can be implemented in support of a Supreme Court directed mandate for a Corrective e-vote, is cited in Article I, section 8, which states that the Congress has the right to-- "...make rules for the Government..." Considering that there is a Federal Election Commission, this provision can be interpreted to include Congress' ability to direct this body in securing a truly "fair and accurate' vote tally as ultimately mandated by the Fourteenth Amendment of the Constitution. Furthermore, Article I, section 8 of the Constitution sets forth-- "The Congress shall have power to...make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other

Powers vested by this Constitution in the Government of the United States, or in any department or Officer thereof."

In other words, as necessity dictates in serving the rights of the citizens under Constitutional Law, and in the name of Justice and Equality as pertains to the most basic principles of our Democracy in these United States, the Congress has the ability to form legislation in any and all areas of governance, including elections, and especially for the sake of optimally protecting every citizen's Right to equal protection under the law. Furthermore, the current media drumbeat, that the December deadlines, for the choosing and meeting of electors, is somehow etched in stone, is specious. Article II section 1 of the Constitution clearly sets forth -- "The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." This article clearly gives the Congress discretion to officially set any date within a reasonable time frame and taking into consideration, unusual circumstances such as are confronting the nation now, as we seek resolution to the fact that the current vote tally has a known margin of error far in excess of the possible margin of "victory" to be claimed by either candidate, thereby rendering the current vote count to be unconstitutional and therefore, invalid, as described by the Fourteenth Amendment, which guarantees the right of each individual citizen to enjoy equal protection under the Law, the true and specific measure of which is the vigilance in maintaining the highest possible vote collection standards of efficiency, as provided for by the implementation of the most competent available technology for ensuring the maximum number of votes are counted in any given election. This most basic Constitutional/Democratic Right, to have every vote counted as efficiently as possible, should easily supercede any budgetary considerations and be made a requisite part of Congress fulfilling Its duties as specified by the Constitution and also, as these duties are detailed in the Voters Rights Act.

Another Constitutional Article which may be implemented to

successfully mediate the current and possibly future election crises, is as follows, from Article II, section 2, which states -- "He (the President)shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur..." Nowhere does it state that such mediation is restricted to foreign affairs alone. Hence, the President should be allowed to, with the Advice and Consent of the Senate, provide for such terms of formal mediation in the form of a treaty (detailing a Corrective Re-vote Strategy), between two warring domestic parties within these United States, in the name of the Common Good and the general Peace. Such an effort would be a vital supplement to upholding the virtues of equal protection as described by the Fourteenth Amendment, by invoking a truly bipartisan compromise seeking the refuge and commonality that should exist in helping to protect the voting rights of average citizens.

Furthermore, Article II, section 3, empowers the President further, stating -- "He shall from time to time, give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public ministers; he shall take Care that the laws be faithfully executed, and shall Commission all the Officers of the United States." Clearly, the language stating the President, "...shall take care that the laws be faithfully executed..." charges the President to intercede publicly by directing the Congress to expedite the passage of corrective legislation calling for a Corrective Re-vote, in this case, on behalf of all citizens whose basic protections under the Fourteenth Amendment are being stipped from them by the current deeply flawed and imminently correctable voting apparatus which is guilty of denying thousands of American Citizens of their most cherished and basic Democratic Right, to have their voices heard in a Presidential election, or any other

election for that matter.

With regards to the Supreme Court, as it pertains to the current election crisis, Article III, section 2 clearly sets forth -- "The judicial Power shall extend to all Cases, in Law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority...to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- [between a State and Citizens of another State; --]between Citizens of different States..." Clearly, this Article and section provide for the Supreme Court's inherent Power to adjudicate on the grounds that a clear and bitter Controversy exists, "to which the United States shall be a Party..." and which can be simultaneously defined as being, "between a State (Florida) and Citizens of another State (I'm from New Mexico)." In fact, the article applies in every stated context to the current Controversies swirling amidst the partisan battle for the Presidency. If the will of the voters, as protected under the Fourteenth Amendment, is properly upheld, all other litigation becomes moot, and we can finally have a restoration of our national Peace and Tranquility. In support of the right of common citizens such as myself, in making appeals to the Supreme Court, or any other Federal or Public Institution, the First Amendment clearly states -- "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."This is precisely the Constitutional Right being exercised by the filing of this Amicus Curiae Brief. The Tenth Amendment is also instructive in helping to clarify the current Presidential Election dispute by asserting -- "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Therefore, by the Charge of the Tenth Amendment, any citizen ("the people"), has the Right to assert our Constitutional empowerment to express remedies at times when such solutions are not forthcoming from the other branches of Government. To that end, and under the aegis of the Tenth Amendment, I am submitting a call for a Corrective Re-vote in all states with a margin of "victory" not large enough to overshadow the margin of error relative to current balloting techniques, and as required by the equal protection afforded to every voter under the Fourteenth Amendment. The very presence of voting methods which discard the will of thousands of American voters is simply unconstitutional and must not be allowed to stand. To allow the current invalid vote to remain, is to allow for the most elemental

subversion of our Democratic process while simultaneously ignoring the implicit mandate of the United States Constitution.

In conclusion, I feel it is my civic duty to this great Promised Land we call America, to speak out on behalf of the sacred trust of our democratic Process, the heart of which is our equal protection under the law as guaranteed by the Fourteenth Amendment of the Constitution. I do not use the term Promised Land, lightly here. For truly, when we consider the full weight of what America has represented to so many oppressed and yearning cultures for so many generations, one can clearly see the living truth is far more palpable than the tired cliche.

We are a Promised Land, and it is our sacred Democratic trust to treat our nation as such, for when that most basic Right to be counted in participating in the solemn duty of selecting our President, is reduced to a mere formality with no actual substantive regard for the true will of the voters, we are allowing the very Constitutional Foundation this nation depends on for Its stability and prosperity, to be grossly eroded and intentionally left in disrepair. By such calloused disregard is the road to ruin paved. Please, consider this appeal of a common citizen, with an open heart and mind, for the very core of our Democratic ideals as we apply them in the practical workings of our nation, and as they contribute to the overall Peace, is hanging in the balance.

By simply and justly upholding the Constitution, America's citizens will finally receive our fair and equal protection under the law. Allow the voters a fair and efficiently managed election, and we can finally have a vote which will not be arbitrarily voided, or poisoned by unquenchable doubt and the partisan enmity which is sure to escalate in increasing measure as our new President attempts to serve the public interest and trust.

We The People of these United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America. By mandating a Corrective Re-vote, the Supreme Court will successfully defend and honor all of the basic Constitutional imperatives set forth above and in the preceding pages, for the greater good of every American, from common citizens like myself, all the way up to the President of the United States. As the current Presidential Election crisis continues to unravel along with the public's confidence and trust, We The People, in order to form a more perfect Union, are words we must never allow ourselves to forget, for they are far

more than just words, they are our living link, the precious membrane by which our democratic Vitality and Purpose are essentially nourished and preserved. Thank you for your time and consideration of this urgent plea.

Respectfully Submitted,

Gregory Apelian
534 Jewel Court SE,
Rio Rancho, New Mexico 87124

EXHIBIT 2:

AMICUS CURIAE BRIEF
Pro Se (Now Consolidated with Brief Amicus Curiae DISENFRANCHISED VOTERS IN THE USA)
U.S. Supreme Court
Docket # 00-836
November 28, 2000

Justin A. Frank, MD
3235 P St., NW
Washington DC 20007

QUESTION PRESENTED:

Whether deprivation[1] experienced by and known to up to 30,000 registered voters in Florida whose ballots were, for one reason or another, not counted in the final tally can cause voters in Florida in particular, and the entire American electorate in general to suffer serious alienation from democratic institutions thus leading to either apathy or a rise of violence on an unprecedented scale?

Justin Frank, MD, is a non-partisan physician, committed to the free and fair operation of our legal/political system. He holds an abiding concern for freedom of participation in our system of government as essential to individual well-being. Through Dr. Frank's large experience working with families, we as an association[2], are acutely aware of the necessity for recognition of an individual's intention and of the repercussions that result when intentions are frustrated or ignored. Further, we are aware of the fragility of systems which foster and guarantee that recognition. The frustration of expectations can set in motion the capacity for destructive patterns of behavior, including but not limited to rage and or its opposite extreme, retreat and apathy. Security is a prerequisite for the development of confidence in the political life of a nation. Where a voter is deprived of the experience of a secure environment based on transparency and predictability, the experience of negative consequences are not

[1] Those citizens who are "disenfranchised" include: the UN-counted (e.g. overseas military ballots):the DIS-counted (e.g. those whose ballots were discarded because machines failed to read them: those who asked for a fresh ballot because of machine malfunction and were refused, etc); and those who felt they were prevented from accessing the polls (viz. reported harassment of minorities).For simplification, the general terms "disenfranchised" and "disenfranchisement" will be used to cover all three categories.

[2] This association consists of Dr. Frank; Micheline K. Frank, DCP; Ellen E. Frank, Ph.D. who collaborated extensively on this Amicus Brief

necessarily contained locally. Accordingly, Dr. Frank feels that it is imperative that the psychological implications of voter deprivation be factored in to the Supreme Court's deliberations of the grave questions presented before it in this appeal.

ARGUMENT

1. In political life, one of the elements necessary for security and well-being is the right to vote and to have that vote count. The psychological damage of an insecure voter environment can be extrapolated from the agreed prerequisites for secure and productive lives. Theimportance of a "political ego"[3] cannot be denied; further, theconsequences, intended and not, for the body politic that result from deprivation of its political ego, cannot be ignored.

2. Voter deprivation affects group cohesiveness and stability. IT ALSO affects how group members perceive the world around them. It can lead to extreme apathy, or violence.

3. The first practical remedy is an expeditious recount of presidential votes. This recount may be accomplished in two ways: a statewide recount which must include dimpled chads as actual evidence of the voter's intention; or a statewide re-election just for President.

The second and only other possible remedy is to divide the electoral votes inhalf (13 to 12 with the majority belonging to the contested winner). Giving all electoral votes to one candidate, given how the close race - without statewide re-count or re-vote - makes no logical sense and will contribute, through voter deprivation, to injury of the voting population. Such injury is characterized by a strong sense of grievance: citizens do not go to the polls to not vote for President. Expeditious methods - for example, the use of volunteers or the National Guard - can be employed to do the recount. This recount should be done by touch as in the Braille Method, as well as by sight: touch is an objective method for detecting the dimpled chad. While any remedy will result in some resentment, turning one's back on voter deprivation would have worse repercussions, both short and long term. "An environment that is passively frustrating...invites depression, or a depressive apathy which may be concealed by the pursuit of any time-killing

[3] Dan Jacobs wrote extensively on the topic of the psychological importance of a political ego. His papers reveal that having a sense of political belonging in our society is an important factor in mental well-being

amusement."[4]

A. THE DANGERS OF VOTER DEPRIVATION.

1. Individual dangers - present and future

To be Discounted is not to have a voice, and thus from a psychiatric point of view, to not really exist. It is thus a denial of the most primitive existential need to "BE." Being requires recognition by other, in this case recognition by the governing body. The repercussions are acute not just for those whose votes are uncounted or discounted, but also for all who witness this process: all lose faith in a system which does not confer recognition upon its members. The sense of outrage expressed by many over the last few weeks is a primitive and powerful feeling that stems from the fear of being erased, or of ceasing to exist as a person. This feeling is compounded by helplessness, which in turn triggers rage, violence towards others, or apathy and depression if turned inward. This trauma results, then, in a distorted self-image, as well as causing the individual to have a distorted image of his world. The individual has fundamental psychological mechanisms at her disposal since birth which help protect her from experiencing feelings of pain, of being attacked, or of the helplessness just described. That fundamental psychological mechanism, "projection", is a method by which the individual gets rid of bad feelings in the mind by relocating them outside the self. Thus aggressive behavior, once a cause of internal conflict or ambivalence, gets attributed to others and the individual now feels she is only acting in response to attack. Such projections are often relocated in our conception of institutions. These numerous projections range from feelings that the Government is greedy and intrusive to a sense that the Government is unreliable and indifferent. Stable institutions withstand such projections. Unstable institutions leave the individual not only unsatisfied but prone to paranoid anxiety and distorted thinking.

Another consequence of disillusionment with the system is the loss of a sense of goodness in the government. One becomes like Aesop's fox and gets filled with feelings of dismissive contempt. Being dismissed results in becoming dismissive. Government, which once was viewed as protecting us from our baser impulses (cf. Freud, Money-Kyrle, and Joan Riviere[5]) no longer is

[4] Money-Kyrle, R. *Psychoanalysis in Politics.* Duckworth Press London 1951, p129

[5] All three eminent psychoanalytic thinkers have contributed extensively to the relationship of individual psychology to social structure. Freud in *Civilization and it's Discontents* (1930); Roger Money-Kyrle in *Psychoanalysis and Politics* (1951) and Joan Riviere in her public lecture "Hate, Greed, and Aggression" (1937), reprinted in Hughes, A. (ed.). *The*

experienced as providing that protection; that security is lost. We then risk resorting to the search for goodness elsewhere. Sometimes this search has a positive outcome: loss may lead to renewed self-reliance or to a focus on religious values. But if this search is accompanied by contempt for the system of government itself, the individual may become enamored with leaders or systems which express his own contempt. Thus hate readily finds an accomplice in the disenfranchised. Government exists, in this psychological function of the mind, as a space, a place to receive "our dangerous and destructive feelings in such a way that we obtain the maximum security in life and pleasure too."[6] In other words, the individual begins to derive pleasure in dangerous and destructive feelings and, consequently, in the expression of these feelings.

One also internalizes dismissive treatment, a process which results in apathy and dismissing of the self by the self. One feels unable to make a difference or to be an active participant in political life. One dismisses others by blaming. In cases of severe injury, the concept of transgenerational transmission of trauma, developed by Dr. Vamik Volkan, applies. Volkan[7] wrote about conscious and unconscious transmission of memories of pain to future generations. Thus the Jewish woman in Palm Beach who was denied another baliot after realizing she had mistakenly voted for Buchanan relived a modified version of the Holocaust trauma. Transmission of post-Holocaust trauma had been interrupted by living in the United States where, until this election, numerous voters basked in the liberty of being able to vote their choice. Suddenly that changed. Some individuals for whom this has changed have filed sworn affidavits in West Palm Beach.

2. The Individual and the System

Those who attain power based on voter deprivation will be those who are content to disregard the disenfranchised. Maintenance of this power comes to require continuing disregard for the disenfranchised. The people who receive projections - those in power - must think about them and modify them, as the healthy mother does for her child. Thus if the mother is accused of being hurtful she has to think about that from the child's perspective and act accordingly. But in the political life of systems, such unwanted projections by individuals are also unwanted by the system itself. The political system then denies the legitimacy of

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inner World and Joan Riviere: Collected Papers 1920-58. Karnac, 1991

[6] Riviere, J., in Hughes, A. (ed.) *op.cit.* p182

[7] Volkan, V. *Bloodlines: From Ethnic Pride to Ethnic Terrorism* Basic Books, New York, 1997

the angry "projectors", labeling them as irrational. A two-way paranoia develops, with neither party being able to listen to or think about the needs of the other. The uncounted will feel discounted, and will suspect the party in power. The party in power will likewise suspect the outsiders. This is a natural psychological process within groups.[8] It is dangerous and may lead those in power to tyrannize those without it. Further, those in charge may attack the very system itself - just as the disenfranchised do. As confidence in the benignity of power relations breaks down because of disputes over feelings of disenfranchisement, we are left with paranoid accusations on both sides - accusations which each side handles differently.

The individual exists within a system which confers identity and existence on that individual. The sense of self as a responsible and contributing individual is challenged if that individual is disenfranchised. Those who are vote-deprived may resort to blaming other systems. For example, if one is discounted by the executive branch of the system - that very system which exists to protect the individual and to ensure that the individual is counted - the individual's only resort is an appeal to the judiciary. For a Chief Executive to in turn attack and "discount" the Judiciary itself is then doubly destructive.

This fractured group behavior is one of the immediate outcomes of voter deprivation. Attacks on the Florida Supreme Court thus have the effect of rendering the disenfranchised individual even more helpless. At the same time, those who attack the system seek to legitimize voter deprivation and to invalidate the system that exists to protect individual rights and freedoms.

3. The Individual and Democracy

If the ingredients of a democratic system are: a) self-defining individuals who have validated existence;
b) an active, participating populace that supports the expression of the individual; c) a structure that respects, confers existence on and counts that populace.

One can see here voter deprivation affecting all levels. The discounting of individual votes, the discrediting of the system for counting those votes, and the attempted discrediting of the judicial appeal system (as "illegal" or "inventing") all combine to create the most subtle and pernicious danger of all, a conflation of our governmental systems into a single system, the rule of those in power. To discount individuals becomes lawful. This evokes chilling echoes of fascist systems.

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[8] Bion, WR, *Experiences in Groups* London, Heinemann Press 1961

In psychoanalytic terms, the mother provides what Mahler calls "object constancy"[9], giving the child the feeling that it can move closer and further away from mother but she will still be there. This sense of a predictable and consistent caregiver gets internalized and the child becomes an adult with a built-in inner stability and sense of self. Still, the environment of the adult must meet similar needs for security. It, too, must be constant, predictable. The right to vote and to have that vote count is just such a necessary precondition of adult object constancy, without which one may develop what we now call "voter deprivation syndrome" - a syndrome in which the victim becomes apathetic and disillusioned with democratic institutions or else becomes violent. These unstable self-states vary with irregular regularity.[10]

A split develops in the mind between the government system (which I will call object) and the self-system (which is the individual whose intentions are thwarted). One result is Rambo - a folk hero who felt that his greatest enemy was not the Vietnam Communists, but our own government which hampered his ability to fight a war to the finish. What may have been humane on the government's part became persecutory and controlling to Rambo. Hence his folk-hero status. That Rambo-as-hero resorted to physical acts of violence and shows of strength, demonstrates one crucial negative consequence of governmental thwarting or neglect. In such movies as "Hopscotch", which came out almost at the same time as Rambo but never enjoyed its popularity, the thwarted individual exacts healthy intellectual and humorous revenge against the thwarting governmental agency.

The aim of integration of self and other fails when the "other" fails the self - actively or passively. A severe split in the mind destabilizes the self which in normal circumstances could rely on the "other" to help regulate his own feelings and actions. The results, according to recent work by Akhtar,[11] are intense oscillations of self-esteem, violent reactions which are unpredictable, and the lack of a feeling of temporal continuity. Experience is fragmented into little bits, rather than felt along a tradition or a continuum. Groups become unable to understand one another and negative mood swings, if unchecked, "might

[9] Mahler, M.S. and Furer, M. *On Human Symbiosis and the Vicissitudes of Human Individuation.* New York: International Universities Press 1968

[10] Frank, JA. "The Voter Deprivation Syndrome, Past and Present", *in press,* 2000

[11] Akhtar, S. *Inner Torment: Living Between Conflict and Fragmentation.* Jason Aronson, New Jersey, 1999 p14.

result in destructive and violent acts."[12]

B. ANALOGY WITH THE FAMILY SYSTEM

The analogy between body politic and the family is of crucial importance in understanding the psychological dangers of voter deprivation. From a psychoanalytic viewpoint, it is impossible to separate the individual's need for recognition from the earliest child/parent relationships. The family model, the analogy between family and body politic, is of crucial importance in understanding the psychological dangers of voter deprivation. The young child thrives best in what Hartmann[13] calls "the average expectable environment." Hartmann states that adults living in society need a benign environment to encourage and not impede growth. He wrote, "the task of man to adapt to man is present from the very beginning of life. Furthermore, man adapts to an environment part of which has not, but part of which has already been molded by his kind and himself…Thus the crucial adaptation man has to make is to the social structure, and his collaboration in building it."[14]

British psychoanalyst Roger Money-Kyrle was explicit in linking family life with political life. He described how the environment impacts the individual - whether it be family environment and the child or the State environment and the adult. He wrote, "The state guarantees us a certain measure of protection. It demands from us a certain measure of obedience. It inspires, or may inspire, our loyalty. In short, our relation to it…is of the same general form as our relation to our parents, so that it is inevitably personified as a parental figure."[15] Beneficent government, as in the case of kind and loving parents, diminishes distortions and promotes clearer thinking. A tyrannical government, however, or one which takes away certain fundamental rights, will increase "the old sense of inner persecution" and the kinds of thoughts which protect against that familiar childhood anxiety.[16] One's conscience becomes modified over time in response to frustrations. Various acts of violence occur without conscious guilt.

FAMILY AS CONTAINER

For a family to feel secure, anxiety stemming from what Money-Kyrle calls feelings of inner persecution needs containment and modification. The government functions as a container of

[12] *Ibid.*

[13] Hartmann, H. *Ego Psychology and the Problem of Adaptation* New York, IUP, 1939

[14] *Ibid.* p31

[15] Money-Kyrle, R. *Op .Cit.* p126.

[16] *Ibid.*

anxieties, a government whose laws keep us from enacting our more base instincts and urges. In families, from the beginning of the mother/infant relationship, there develops over time a sense of confidence in the mother who is able to experience her baby's needs and respond accordingly.

Second, there is the problem of the closed door, the parental bedroom unconsciously out of which the child is locked. The child in a healthy family has hope, he can amuse himself or play with friends or read or watch TV, knowing full well that sooner or later that door will open - even though he experiences pain and frustration when it is closed. Part of the child's confidence is based on the experience of having parents open the door regularly (or even irregularly) before. It is when that confidence is challenged or compromised that the child starts having trouble with issues of trust in his/her environment and eventually having trouble with trust in himself.

The same is true in the larger political sense; in that voters, while not having direct or immediate access to their representatives know that their representatives are responsible to them and can be turned out of office or are available to hear their grievances. If they are not elected - and by this I don't mean that when the candidate favored by the voter of one political party is defeated - the voter still has access as a constituent as well as having hope to change things when elections next come around. There is a sense, therefore, of predictability and of confidence in the system. This helps manage feelings of helplessness and frustration which get stirred up at times when people disagree with policy. Everyone knows that Congress is elected every two years and the Senate every six and that Presidential elections occur every four years on the second Tuesday after the first Monday of November in years divisible by 4. What happens if one doesn't have that confidence - if one can't just vote out a leader or overthrow him? Our government has survived in part because of its having kept faith with the legal system, assuaging what anxiety might otherwise arise if the system were to break down. Otherwise we would have a dysfunctional government, not the steady one described by Churchill as the worst form of government except for all the others.

Law is essential to the processes of predictability, containment, and accessibility. There is an ample body of psychoanalytic literature about the importance of rules in society to protect citizens from themselves. As Dr. Ernest Wallwork wrote, "The rule of law is essential for civilization because humanity's

instinctual predisposition to violence and selfishness requires a mechanism for making it in everyone's self-interest to 'restrict themselves in their possibilities of satisfaction' and to band together to resist domination and exploitation by those possessing superior strength....In order for this to happen, 'the community must be maintained permanently, must be organized, must draw up regulations to anticipate the risk of rebellion and must institute authorities to see that those regulations - the laws - are respected and to superintend the execution of legal acts of violence.'[17]

The rule of law is now in a crisis, as explicit election law may dictate one thing - a smoothly running system. But it can also undermine another - the messy process of having everyone having a say in choosing who will lead that system (the right to vote). What I know is that the thwarting of a person's intent to participate in his or her future, the blocking of access to that participation which is central to our democracy, and the dismissal of predictability that every vote counts and will be counted will have severe deleterious long-range effects on the everyone's psyche and hopes to live in a increasingly secure world.

Freud wrote that justice should apply to everyone equally - and he wasn't one of our founding fathers, though he is one of mine. He noted that when leaders put themselves above the laws which should apply to everyone, they start to re-retreat "from a dominion of law to a dominion of violence."[18] And part of upholding the law requires renunciation of personal desire - at least in some instances. Freud wrote that if just principles and moral precepts benefit everyone in the community, renunciations will be less painful and the community has a better chance of coming together for work and fruitful living.[19]

In development, structure leads to new coping mechanisms to manage and prevent expressions of impulses, pain, loss, greed, etc. Family members may sublimate their destructiveness, for example, into some form of relatively benign sibling competition. But when material structure is compromised in the family as well as in society, similar mechanisms (self-glorification; sense of injustice; an attitude of innocence; sense of entitlement have the opposite intent - instead of being coping mechanisms used to manage or prevent destructive expression,

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[17] Wallwork, E. *Psychoanalysis and Ethics.* Yale University Press, 1991 p.274 Wallwork in that passage quotes S. Freud from the *Standard Edition*: vol. 21:95 and Vol.: 22:205.

[18] Freud, S. *Standard Edition* trans. By James Strachey . Hogarth Press, London Vol. 22, p206 1933

[19] Wallwork, E., *Op. Cit.* P283

they are used to express instincts.[20]

In America, it is the Supreme Court which does a major part of that containing. It protects the rights of citizens to pair off, to argue and fight, to get certain needs met without causing excessive anxiety which would lead to breakdown. All three factors - feeling contained, having access, and having influence - are compromised by the sense of not having one's vote count.

It is impossible to summarize the long term effects that slavery, violence, and murder have had down generations. I insist that no matter how much one may try, that memory - emotional even more than factual - remains unconsciously imbedded in all our souls. A poetic description of this history, this ever-present memory, is described by David Bradley at the end of his novel, *The Chaneysville Incident*:[21]

"For a moment he was not sure that he could lead them, was not sure that they would follow, but then he saw Harriette Brewer take her knife from beneath her shawl and hold it high, and then he heard her, heard her singing softly, then louder, heard the others join in, the words of the song growing, rising up from the hilltop, floating down the incline, the words sharp and clear against the night: 'And before I'll be a slave I'll be buried in my grave, and go home to my God, and be free.' For a chorus or two, or three, the song was loud and strong. And then the song grew weaker, the voices that had raised it falling silent one by one, until at last there was only one voice, a strong soprano voice, carrying the song. And then that voice, too, fell silent. But the song went on. Because the wind had shifted again, and was blowing from the west; because now the wind sang."

CONCLUSION:

In summary there is ample psychoanalytic and historical evidence for the existence of voter deprivation syndrome - which leads to a fragmentation of a sense of self because of the loss of a secure predictable environment. This loss, the indifference to voter intent and to votes being counted, leads to depression and apathy as earlier childhood losses get re-activated. Then there can be a circle of blame, where the person or disenfranchised group starts to see other groups as enemies who are robbing them of their rights. What the groups had in common before this rupture gets lost, and what remains is intense enmity. That is what is happening at present between the supporting camps of the warring political parties: recounting ballots for "A" means voter deprivation to "B"; not recounting

[20] Levin, S. *International Review of Psychoanalysis* Vol. 5, Part 1, 1978
[21] Bradley, D. *The Chaneysville Incident* Harper & Row, New York. 1981

for "B" (meaning that votes have already been counted) means voter deprivation for "A".

The pain of voter deprivation gets handed down unconsciously as injury from generation to generation. While the trauma at first seems only to be in parts of Florida one can see how national interests are at stake. What is at stake is the security of prediction of elections, of redress, which will never be denied by government fiat. At stake is security that votes intended will be votes counted. At stake is confidence in our judicial system to be able to think and then to be able to protect the rights of an injured populace. And what is at stake is the stability of our society which has remained stable through many upheavals in the past because of the rule of law and the knowledge that everyone has a vote in this nation should he choose to exercise that right.

Finally, there have been recent studies made about what Apprey[22] calls transgenerational haunting in which he states "it is as if the injured group has accepted the message that they do not deserve to live [or that they do not count for anything] and therefore must die in one form or another. At the very least that injured group may exist in a reduced form such as living but living a most unproductive life. Here the motor of ambush toward one's death remains the same but the license plate, that is, the form of reducing oneself to nothingness, changes from one generation to the next."

This kind of injury to the body politic, to the political ego - if you will - is an injury to our entire society and its capacity to feel secure in its institutions as well as secure in its power to make a difference by voting and having votes count. Loss of faith in this system has consequences which can only be inferred from what has happened to other groups when their essential freedoms have been usurped - women, African-Americans, European Jews just to name a few. Security in the body politic has reverberations with "containment" in the family - and without either, the sense of political potency elides into apathy and cynicism, leaving feelings of inner persecution and rage unchecked.

It is imperative for the health of our democracy and incumbent on the Court that it address the issue of full recount and/or new vote. It is believed that the High Court's failure to do so would

[22] Apprey, M. "Reinventing the Self in the Face of Received Transgenerational Hatred in the African American Community" in *Mind and Human Interaction* 9: 30-37, 1998

constitute a serious and fundamental abdication of its precious responsibility to uphold the concept of the rule of law. The High Court cannot and should not be dismissive of this concept. Were it to fail to act, the Supreme Court of the United States of America will damage the voter - undermining faith in Court itself as protector and insurer of democracy, of voter value, of voter rights.

EXHIBIT 3:

Pro Se filing of
Amicus Curiae Brief (now consolidated with
DISENFRANCHISED VOTERS IN THE USA)
On behalf of: Richard M. Yellin,
On Petition for Amicus Curiae to the Supreme Court of the United States

Rabbi Richard M. Yellin, A Private Citizen,
10801 Royal Palladium Place
Boynton Beach, Florida 33436
Palm Beach County
(561) 735-3929

Some colleagues asked, what went on here. Here is my own sworn testimony to the DNC – Rabbi Richard M. Yellin. Sworn on Nov. 12, 2000 at DNC Delray Beach Florida (Lake Ida Road and Congress Avenue)

I came to my voting precinct at the St. Thomas More Church in Boynton Beach, Palm Beach County, Florida, at 6 30 am on Election day 2000. I was fifth in line waiting for the precinct to open. By the time it opened, about 30 people had already lined up, and by the time I exited from the poll at 7:15, 100+ individuals were waiting to enter a very crowded precinct area. I was fully prepared to vote my choices with my own pre-prepared list of candidate selections and referendum choices. I came early to vote because I had to be at my Synagogue, by 8 am to speak at a morning religious service.

When I entered the precinct I signed the voter register and received the "computerized ballot." I went to a cubicle on a desk that had a "votomatic" platform which had a "butterfly brochure" fixed on the platform, with pages of the brochure to be turned sequentially so that candidates and referendum questions could be "hole punched," i.e., voted for. I followed the instructions placing the ballot into the slot so that it could be properly fixed and aligned under the "butterfly" so that the holes on the "butterfly" lined up over the computerized "ballot."

At that point I started the voting process. I wanted to vote for Gore/Lieberman. I searched for the Gore "butterfly hole" and could not find it!! The arrows to the right of the candidate's name, pointing to the proper "butterfly hole" did not align

properly !! I struggled to find the appropriate place for my vote, and tried to figure out which one it was by looking at the Bush "hole" and the others on the page. By a process of elimination, I chose the hole I thought was for Gore and Lieberman. I took 3-4 minutes to do this. It made me feel rather stupid, so I hid my stupidity, figuring that I voted my choice. I went on to all the other candidates on the next pages of the "butterfly" and the alignments to the proper holes were arranged neatly and to perfection, and I was out of the little cubicle (which was not very private in the least!), and I took out my "ballot" from the "butterfly" and placed it in the ballot box upon leaving.

As I left I heard 2-5 people complaining that it was difficult to vote for President and V.P. I did not have time to consult with these individuals because I had my appointments. As I drove away, I had a gnawing feeling that something was not right, with the blame on me. I had a sample mock "butterfly" that was mailed out before the election, and I looked at it briefly while driving and I saw that it did not look anything like the "butterfly" that was attached to the "votomatic." At which point I dismissed the experience and went about driving.

At 7:45 am, when I came to my synagogue, (of which I am the Rabbi and Spiritual Leader), Temple Emeth of Delray Beach, a 2800 member congregation of retired senior citizens, our parking lot was a beehive of activity. A voting precinct is housed in our facility's auditorium, and it had lines waiting to go into vote. I went into my office to prepare my sermon and at 8:10 I went out of my office passing the voting precinct waving to many voters whom I knew. I rushed past the auditorium and went into the Chapel and began the service with a sermonette on the subject of voting and religious freedom. I told my "prayers" that in order to be religious, they had to vote, because political freedom is the guarantor of religious freedom. At exactly 8:20 am my speech was interrupted by a synagogue staff member (Jerry Monroe) who said to me in front of the 60 people in the chapel, "There is a problem in the precinct," and he summoned me to the precinct. My 7:15 emotions began to gnaw at me again.

I entered the precinct ahead of the lines and I was told by several people leaving that they had trouble voting their choice for President. In fact one person was crying that she thought she had mistakenly voted for Buchanan.

I summoned the supervisor (Roz Cohen) of the precinct housed in our facility and I asked her to get the butterfly ballot from one

of the "votomatics" and to look at it together with me. Two or three other people gathered around, and it was the identical "butterfly" that I had used at the Church. I said to the supervisor that the arrows are completely misaligned with the holes and therefore the ballots could not be punched, expressing with certainty the intent of the voter. She agreed, and I asked her to interrupt the voting in the precinct and I told her that the precinct should be closed until an announcement was made to all those voting, that 'the "butterfly brochure" was problematic, and that people should exercise great care.'

I said to her that the supervisor of elections in Palm Beach and in Florida should be called immediately. She agreed. The phone lines to the election board were busy. She made the announcements, and I went to call all the media outlets in the area -- 3 TV stations and the radio station of record.

At which point, I felt I did my duty and I went into the synagogue office and began listening to people exiting from the precinct who complained that it was an impossible experience, and how they think they voted for Buchanan by mistake because of the "butterfly." At that point, I too put 2 and 2 together and I think I may have voted for Buchanan, a vote that would be anathema to my whole political disposition.
By 9:15 I had meetings in my office and duties to attend to, and thought that others had been sufficiently apprised of the situation and that it was in hand. Wrong, by mid day all hell broke loose in the media.

Addenda: On Friday night November 10, I had planned to speak about Kritallnacht, the Rabin Assassination, and Veterans Day. Instead, before 500 people I asked them to share their voting experience during election day. Several people got up to speak and told their stories that they had trouble with the "butterfly" in trying to vote for Gore, and they think they voted for Buchanan. (It is important to know that my congregation has well over 100 holocaust survivors, and no one would have knowingly voted for Buchanan. I took a referendum on that!)

At which point several people in the congregation began to laugh at those who expressed a problem with the vote! I asked those who were laughing to explain their lamentable public ridicule. They said they voted, and it was a piece of cake. I then asked them to explain why it was easy for them. They said their "butterfly" was lined up correctly and all they had to do was follow the arrows for the candidates and punch the holes.

In response, those who had the problem, said publicly that they had a DIFFERENT LOOKING "BUTTERFLY" AND THE ARROWS WERE MISPRINTED. I then took a tabulation. "If you thought the votomatic was easy to use, raise your hands." 50% raised their hands. Then: "If you were troubled by the vote and think you may have voted incorrectly for Gore because of your "butterfly", raise your hands." 30% raised their hands. 20% were unsure.

The conclusion of this "Town Hall" sermonic discussion!? There were two different versions of the "butterfly" or maybe even a partial misprint of the butterflies used by many voters in various precincts of Palm Beach County.

I tried the same experiment on Saturday morning to an even larger crowd, dispensing with the planned sermon, asking people to share their voting experiences. The Saturday morning congregation is made up of different people than the Friday night congregation. To my amazement the same thing happened again. People laughed, and slowly they came to the realization that there were 2 different versions to the "butterfly." The tabulation was virtually the same as the previous night.

Conclusion: The real problem is the "butterfly" brochure. There were misprints in the alignment of arrows and holes, and there were bad "butterflies" hovering within and mingling with normal "butterflies," and the way you could predict who received infected misprinted "butterflies," was to scan the precincts where Buchanan received greater numbers of votes than in other precincts in Palm Beach County. Palm Beach County also had more Buchanan votes compared to all the other 50+ counties in Florida. It just so happens that the Buchanan factor surfaced most within Jewish and Afro-American areas and precincts. As an Afro-American pastor, Oliver Wilkins, said, "there is no one in his congregation who would for a moment think of voting for Pat Buchanan." Buchanan subsequently went on air saying he knew that these exaggerated votes, close to 3500 in Palm Beach County, "should not have gone to him."

The real question for these 3500 suspected votes: Why doesn't the government impound all the "butterflies" and search for the misprinted ones.

The media is totally confused by this, and it is no wonder that the former Secretary of State, The Honorable James Baker, could hold up a normal "butterfly," and unconscionably imply,

that elderly, Jewish, African-Ameircans, and Palm Beach County citizens, were "confused" (implying 'stupid'). Mr. Baker, was not confused becauseBush voters were not confused, because their candidate was the first on the list, and you could not mistake punching the Bush "butterfly" hole because it was at the top of the column of holes."

I am a registered independent voter, in the Presidential Election of 2000, born in Philadelphia, PA, who learned as a child: "It is not who won or lost, but how we played the game." In this election, the voting machinery was flawed, not the electorate!

When asked what I recommended, I sent this to all interested parties:

PRESS RELEASE:
Voting Fraud in Palm Beach County

Two area clergymen, Minister Oliver E. Wilkins, of West Palm Beach, Florida, and Rabbi Richard M. Yellin, Boynton Beach, Florida, alleged that voting fraud is a distinct possibility in several Palm Beach County voting precincts that have disproportionately large numbers of elderly, Jewish, or African-American voters. They contend that misprinted/misaligned butterfly brochures rendered the voting machines defective/deceptive when voting for 9 out of the 10 Presidential candidates, making it impossible to properly record voter intent. Many voters thinking they voted for Gore, actually voted for Buchanan. They have also asked the FBI and the United States Attorney for the Southern District of Florida, and the Assistant United States Attorney for election fraud matters, to look into the election fraud with regard to the printing and the distribution of all the butterfly brochures.

Observations on POSSIBLE Voting Fraud in Palm Beach County
Submitted by:
Rabbi Richard M. Yellin, Boynton Beach, Florida

November 26, 2000
We believe that the US Department of Justice will investigate the butterfly brochures of Palm Beach County (and other Florida precincts if necessary). A variety of law enforcement officers will eventually subpoena these butterfly brochures and simply compare them all, and then the world will see that there were defective voting machines -- VOTOMATICS -- in many of the

precincts in Palm Beach County and maybe elsewhere. The FBI, the State Attorney, DOJ, FDLE, and the Special Counsel, will all be asked to investigate. The integrity of the ballot box is the only issue, not who wins the election.

Why are the computerized ballots being recounted when the real problem is the machines and their attached misprinted brochures!? Many individuals will swear that there were misprints/misaligned butterfly brochures. They are the supervisors and workers in several precincts and they represent significant constituencies.

To date, this issue of the misprinted butterfly brochures has not inspired one government official to impound all the butterflies and machines of Palm Beach County. If they investigated the case, they would find that there are two versions!!! Only certain precincts received the misprinted butterflies. The misprints should also prove why Buchanan received more votes in certain heavily populated Elderly, Jewish, or African-American precincts. Misprinted butterfly brochures are the best explanation of that phenomenon.

Guy A. Lewis, United States Attorney for the Southern District of Florida, said, "Election fraud dilutes the worth of votes honestly cast. It also corrupts the essence of our representative form of government. As a crime against both the individual and the government, it will be dealt with promptly and aggressively." Mr. Lewis stated that "some forms of election crime may be easily recognized, such as voter bribery, voter intimidation, and ballot forgery. Other forms of election fraud are more subtle. It is, for example, a federal offense to seek out the elderly, the socially disadvantaged, or the illiterate for the purpose of subjugating their electoral will."

Mr. Lewis said, "The detection of election fraud depends in large part on the watchfulness and cooperation of the American electorate. It is imperative that those who have been asked to participate in questionable election practices, or who have observed or have information regarding questionable activity, **immediately report it to the United States Attorney's Office or to the FBI**. The cooperation of this country's citizens in helping to protect the ***sanctity of the ballot box*** is crucial. It is also appreciated."

In keeping with the above, we offer this summary of our observations and recommendations.

1. All the Butterflies Should Be Subpoenaed. The Findings Will Reveal That There Are Two Versions with Most Misalignments/misprints Going to Precincts with Disproportionate Numbers of Elderly, Jews, or African-americans. If the Distribution of These Misprinted Butterflies Deliberately Targeted These Districts, Fraud Becomes the Major Issue in the Palm Beach and Florida Elections. This Could Be a Civil Rights Issue as Well.

2. The "Official Ballot Sample" Put out by Terry Leporre Is a Conflation, I.e., a Mix of Different Editions and Formats from Previous Years Added to the New 2000 Edition but Unfortunately Not Integrated Properly -- a Graphic Designer or Biblical Scholar Can See the Botched Redaction. If the Pbc Election Commission Misprinted One "Sample," it Is Not Improbable That Pbc Election Commission Also Misprinted "Butterflies" as Well.

3. The 3500+/- Votes for Buchanan in These Palm Beach Precincts Were a Result of Faulty Voting Machines Containing Misprinted Brochures.

4. The Real Problem Was Not with the Ballots, but with the Butterflies. The Recounting of Ballots Only Shows the Problems That Voters Had in Voting, but it Does Not Reveal Mistakes Caused by Voting Machine Irregularities. The Recounting by Hand or Otherwise, Was a Diversion from the Real Issue.

5. The Printer of the 6000+/- Palm Beach Butterflies, Should Be Interrogated. Those Who Made up the Packages of the Butterflies and Distributed Them to the Precincts Should Be Interrogated. The Boards, the Mechanicals and the Negatives of the Printer Should Also Be Impounded. Anyone Who Was Part of the Process That Distributed the Butterflies into the Various Precincts Should Be Interrogated. Those Responsible for Collecting the Votomatics and the Attached Butterfly Brochures Should Be Questioned as Well.

6. The Official Sample Ballot of 2000 Should Be Compared to the Previous Official Sample Ballots Used in Prior Years. Why Was this Year's "Sample" Different from All Other Years and Why?

7. All the Brochures Used in this Year's Election Should Be Checked to See If Indeed They Were the Brochures Attached to and Used in the Votomatics in Election 2000. They Will Show the Appropriate Wear and Tear and the Binding Marks Holding Them into the Votomatics. A Count Should Be Taken of How

Many Brochures Were Printed, and How Many Brochures Were Collected after the Vote. How Many of Them Are Unaccountable?

8. After Seeing What We Saw and Experienced, One Can Only Conclude That There Were Gross Irregularities Bordering on Fraud and Perhaps Touching on the Possibility of a Very Convenient Conspiracy. Only a Complete Investigation Will Uncover the Truth. We Hope That the Irregularities Prove to Be Random. Only an Act of God Could Have Produced this Randomness. If it Was Not an Act of God, it Was Fraud and Conspiracy.

END